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IN THE

SUPREME COURT OF THE UNITED STATES

_____, Term 1974

No. . . . . .

S. K. BROWN,

Petitioner,

v.

GEORGIA POWER COMPANY, et. als,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Petitioner, S. K. Brown, prays that a Writ of Certiorari issue to review the Judgment

of the United State Court of Appeals for the Fifth Circuit entered in the above case on the 14th day of March, 1974.

OPINION BELOW

The Opinion of the United States District Court for the Southern District of Georgia (Appellant's App. 1-- is reported in_____F. Supp._____. The opinion of the Court of Appeals for the Fifth Circuit (Appellant's App. _____) is reported in_____F. (2d)_____.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit and the Judgment of the United States District Court for the Southern District of Georgia are attached hereto Appendix at pp. 1-2 and 3-22. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), 1343(3), (4) e Tit. 42 U.S.C. 1983.

QUESTIONS PRESENTED

1. Can Respondent and the Superior Court of Burke County, Georgia prevent the consideration of Rights guaranteed to the Peti-

tioner by the Constitution and Laws of the United States by subverting the Laws of Georgia as follows:

(a) Signing a Condemnation Judgment, without notice to Petitioner, on the same day the Special Master filed his report when the law of Georgia granted Peti tioner TEN (10) DAYS to file exceptions to the Special Masters Report (Appendix pp. 75 - 80).

AND

(b) Without Notice or Hearing striking and exponging from the Record timely filed Constitutionally based exceptions to and appeal from the Special Masters Report (Appendix p. 30).

AND

(c) Without Notice or Hearing striking and exponging from the Record those parts of Petitioner's (condemnees) answer which sought to raise those same Constitutional Rights for consideration at the Trial (Appendix p. 37).

AND

(d) Withholding the Record of the Trial in order to prevent the Hearing and Consideration of Condemnee's Motion, filed September 28, 1972 (THE RECORD OF THIS TRIAL HAS NOT YET BEEN FURNISHED PETITIONER).

In spite of these actions by the Respondent and the Superior Court of Burke County, Georgia, the United States District Court for the Southern District of Georgia granted summary Judgment for Respondent, Georgia Power Company (Appendix p. 3 - 22) and the United States Court of Appeals for the Fifth Circuit affirmed without opinion and by reference only to the opinion on the District Court (Appendix p. 1 - 2).

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

TITLE 28 U.S.C. 1331

TITLE 28 U.S.C. 1343(3)

TITLE 28 U.S.C. 1343(4)

TITLE 42 U.S.C. 1983

FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

STATEMENT

Petitioner owned land in Burke County Georgia. The Georgia Power Company, a public utility, after ext ended studies decided it wished to construct on Petitioner's land a plant to manufacture electricity. It therefore commenced an action to condemn fee simple title to said land. (Appeendix pp. 39 - 55).

This action was taken under Chapter 36-8 Condemnation, etc. by Power Companies, Section 36-801 of the Georgia Code Annotated which section only grants the right to condemn "rights-of-way or other easements over the lands of others in order to run lines of wires, maintain dams, flow backwater or for other uses necessary to said purposes." and

this right to condemn rights-of-way or easements is granted only to "any corporation or individual owning or controlling any water power or location for a steam plant. . ." (Appendix pp. 25 - 26). The Supreme Court of Georgia has strictly limited the power to condemn necessary easements.

222 Georgia 830, 381 152 S. E. (2d) 841. Ben W. Hand Farm, Inc. v. The Georgia Power Co.

ON AUGUST 11, 1971, the Condemnation Petition was filed (Appendix Page 55).

ON AUGUST 11, 1971 (before service on S. K. Brown, Petitioner), an order was entered appointing a Special Master and setting a Hearing before that Special Master for August 24, 1971 (Appendix pages 56 - 60).

ON AUGUST 12, 1971, the Condemnation Petition and Order were served on S. K. Brown (Condemnne) (Appendix page 65).

ON AUGUST 16, 1971, S. K. Brown employed counsel to represent him and the court granted his cousel Glenn P. Hester FIVE

(5) additional days to prepare for the Hearing (Appendix page 67).

ON AUGUST 31, 1971, the Hearing was held.

ON SEPTEMBER 2, 1971, the Special Master filed his Report (Appendix pages 68 - 74).

ON SEPTEMBER 2, 1971, IN KEEPING WITH ITS HASTY DISREGARD FOR PETITIONERS (condemnee's) RIGHTS, IN THE FACE OF THE LIMITING STATUTE REFERRED TO ABOVE AND WITHOUT NOTICE TO THE PETITIONER OR HEARING ON THE MATTER, THE RESPONDENT SECURED AN ORDER FROM THE SUPERIOR COURT OF BURKE COUNTY, Georgia condemning fee simple title to petitioner'S LAND. AS APPEARS HERE, THIS ORDER WAS SIGNED ON THE SAME DAY THE SPECIAL MASTER MADE HIS REPORT (Appendix pp. 75 - 80) AND IN THE FACE OF A STATUTE GIVING PETITIONER TEN (10) DAYS TO FILE EXCEPTIONS AND APPEAL FROM THE REPORT OF THE SPECIAL MASTER. (Appendix p. 23)

ON SEPTEMBER 10, 1971, within the ten

day period, Petitioner filed in the Superior Court of Burke County, Georgia his exceptions and appeal setting forth the fact that the Respondent had violated his Constitutional Rights and had condemned fee simple title to his land. (Appendix pp. 24 - 27)

ON APRIL 24, 1972, without ever hearing the appeal and without notice to Petitioner or Hearing, the Superior Court of Burke County, Georgia ordered his exceptions and his appeal stricken and exponged from the record. (Appendix p. 30)

ON SEPTEMBER 10, 1971, Petitioner filed his Answer raising the same Constitutional questions and defenses. (Appendix pp. 33 - 36)

ON APRIL 19, 1972, the Superior Court of Burke County, Georgia, without notice to Petitioner or Hearing, ordered all those references to Constitutional questions and to defenses based thereon stricken and exponged from the record (Appendix pp. 37 - 38)

Thereafter, at the Trial the Court refused to allow any reference to or evidence or ar-

gument about the Constitutional questions of the Respondent's right to condemn (Appendix p. 32).

Petitioner made a Motion for a new trial on the 28th day of September, 1972, (Appendix pp. 81 - 82) and since that time has been unable to get the Record in order to hear the Motion.

When it became apparent to Petitioner that Respondent and the Superior Court of Burke County, Georgia were, under color of Georgia Law as set out above unlawfully depriving him of rights guaranteed to him under the Constitution and laws of the United State be on January 30, 1973, commenced this action in the United States District Court for the Southern District of Georgia in order to protect those rights.

The Respondent filed a Motion for Summary Judgment based upon the allegations that the matter was res-judicada because of the action of the Superior Court of Burke County, Georgia and because the Petitioner withdrew the original deposit placed with the Court after his land had been unlawfully taken from him and placed in the possession of Respondent(Petitioner has never

accepted the Judgment of the Superior Court of Burke County, Georgia and never withdrawn the additional funds granted to him by that jury).

The United States District Court for the Southern District of Georgia granted Respondent's Motion for Summary Judgment (Appendix p. 3 - 22) and Respondent appealed to the United States Court of Appeals for the Fifth Circuit. That Court affirmed the decision of the District Court without allowing argument and without any opinion save a reference to the opinion of the District Court (Appendix p. 1 and 2).

The opinion of the District Court was based largely upon the doctrine of Res-judicada and in support of that theory the Court said in referring to the Judgment of the Superior Court of Burke County, Georgia, "There was no appeal from this Judgment to the Appellate Courts of Georgia."

THIS STATEMENT WAS MADE BY THE UNITED STATES DISTRICT COURT IN THE FACE OF THE FACT THAT IN PARAGRAPH 3 OF RESPONDENT'S SIXTH DEFENSE, RESPONDENT, GEORGIA POWER COMPANY

SAYS: "PLAINTIFF HAS PENDING IN THE SUPERIOR COURT OF BURKE COUNTY, A MOTION FOR A NEW TRIAL AND THEREAFTER HAS THE RIGHT UNDER GEORGIA LAW TO APPEAL ALL ISSUES HERETOFORE DECIDED ADVERSE TO HIM."

The above statement, by the Respondent, shows that the major basis for the opinion of the District Court was erroneous as there was then pending a Motion for a new trial in the Superior Court of Burke County, Georgia, which Motion was made in order to make possible an appeal from the State Court Trial. This is the Motion that has not yet been heard because since September 30, 1972, Petitioner has been attempting to secure a record of their trial in order to have a hearing on the Motion. That record is still being withheld by the Superior Court of Burke County, Georgia -- so the Motion cannot be heard and appeals cannot be entered or perfected.

The District Court Judgment goes on to say: "A careful analysis of the State Court Record fails to reveal any consideration during the state preceedings of the issue as to defendant's power under Code Annotated, Chapter 36-6A to condemn plaintiff's property in fee simple. Such

failure, however, cannot prevent operation of the doctrine of res-judicada in regard to that issue. The Judgment is conclusive, not only as to matters which were decided, but also as to all matters which might have been decided (Appendix pp. 3 - 22).

HOW COULD PETITIONER HAVE GOTTEN A DECISION ON THE CONSTITUTIONAL QUESTIONS WHEN EVERY TIMELY ATTEMPT TO DO SO WAS STRICKEN AND ESPONGED FROM THE RECORD BY THE SUPERIOR COURT OF BURKE COUNTY, GEORGIA AND HE WAS FORCED TO THE TRIAL ON THE ISSUE OF DAMAGES ONLY?

Where can Petitioner go? What can he do? A Georgia Court, by striking from the record all reference to the real issues arising under the Constitution of the United States prevents their consideration in the State Trial and by withholding the record halts the appellate process.

A District Court of the United States says that regardless of this high handed and unconstitutional action, the whole matter is res-judicada and petitioner has not appealed when the Motion, making possible the appeal, is still

pending and when the Respondent has so stated in his pleadings. Inspite of this fact, the District Court granted Summary Judgment and the action was upheld without argument or opinion by the United States Court of Appeals for the Fifth Circuit.

Meanwhile, as a Billion Dollar installation is being constructed on lands wrongfully taken from Petitioner under color of Georgia Law and in violation of the Constitution of the United States, Petitioner is forced to stand outside and the doors of the Courts of the United States have thus far been closed to his pleas for justice.

REASONS FOR GRANTING THE WRIT

The opinion of the United States District Court for the Southern District of Georgia and the opinion of the United States Court of Appeals for the Fifth Circuit adopting that opinion are contrary to the opinions of this Court in numbers of cases and, if allowed to stand, will make impossible the effective enforcement of the Civil Rights Statutes.

The only basis for the opinions in this case, as expressed therein, is that because the matter was heard in the State Court it is res-judicada.

If the doctrine of res-judicada is allowed to control the Federal enforcement of the Civil Rights Law, then everyone whose Civil Rights have been denied under color of State Law will be unable to get any redress or any protection in the Courts of the United States and the enforcement of the Civil Rights Laws will be effectively blocked.

The opinion in this case is contrary to the rule that Federal Courts must exercise their jurisdiction without regard to proceedings in State Courts when Civil Rights are involved. This doctrine was strongly set forth in the case of County of Allegheny, v. Frank Mashuda Company, 360 U.S. 185, 3 L.Ed. (2d) 1163, 79 Sup Ct. 1060, involving a condemnation of land and questions as to the validity of a State Condemnation proceeding. The Supreme Court in this case specifically held that the refusal of the District Court to hear the matter was error. In that decision, Mr. Justice Brennon pointed out on Page 1168 of the L.Ed. that the Federal Courts have been adjudicating State Civil Rights cases since 1878, and in discussing its authority to adjudicate State Condemnation matters, said on Page 1169, "This rational was subsequently applied by this Court to uphold adjudication of state eminent domain proceedings

involving suits between diverse parties in the Federal Courts even though the procedures available would not be the same as those provided by the state practices. . . and even though the case involved the power of the condemning authority to take the property." The opinion in this case is also contrary to the rule laid down in the case of Mitchum, v. Foster 407, U.S. 225, 32 L. Ed(2d) 705, 92 Sup. Ct. 2151, (1971), which held that the Civil Rights Act empowered the Federal Court to enjoin actions in the State Court.

The opinion in this case is also contrary to the rule that Petitioner's property rights are subject to protection under the Civil Rights Laws. This rule is clearly stated in Lynch, v. Household Finance Corporation, 405 U.S. 538, 31 L. Ed.(2d) 424, 92 Sup. Ct. 1113, Justice Stewart speaking for the Court on Page 429 of the L. Ed. says:

> "This Court has never adopted the distinction between personal liberties and property rights as a guide to the contours of 1343 (3) Jurisdiction. Today we expressly reject that distinction. Neither the words of 1343 (3) nor the legislative history of that provision distinguishes between personal and property

rights. In fact, the Congress that enacted the predecessor of 1983 and 1343 (3) seems clearly to have intended to provide a Federal Judicial form for the redress of wrongful deprivation of property by persons acting under color of State Law."

Surely all these statutes and decisions giving the Federal Courts power to hear and determine Civil Rights matters cannot be brought to nought by the doctrine of res-judicada. The judgments in this case also were based on the fact that the Judgment in the Superior Court of Georgia was final. Whether it was a final Judgment or not, the Civil Rights Act may still be enforced in the Courts of the United States as set forth in the preceeding paragraphs.

However, the statement in the United States District Court opinion that a final Judgment had been entered was clearly error as that Judgment was being attacked by a Motion for a new trial after which the appellate process could begin.

That this was not a final Judgment is clearly shown by the decisions of other circuits and the decisions of the Courts of Georgia.

In Automotive Sales Corporation, v. Stayton, 45 Federal (2d) 476, the Eighth Circuit decided that the law of the state where the Judgment was rendered controlled on the question of whether or not it could be pleaded as res-judicada. The law of Georgia as expressed in New Amsterdam Casualty Company, v. Russell, 103 Ga. App. 553, 120 S.E. (2d) 150, is to the effect that a Judgment is not a final Judgment until the appellate process is concluded and the result has been certified to the Trial Court.

If this Judgment of the Fifth Circuit is allowed to stand, it will place serious impediments on the enforcement of the Civil Rights Law and greatly confuse all persons seeking to enforce those laws. The number of cases which have held that State Judicial remedies need not be exhausted before bringing Civil Rights actions and all the other cases fortifying the rights of litigants to come into the Federal Courts for protection of their Constitutional Rights will

be seriously weakened.

It is respectfully submitted that this case and decision should not be allowed to stand.

HAMRICK AND HAMRICK

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S. K. BROWN, Plaintiff-Appellant,

v.

GEORGIA POWER COMPANY et al.,
Defendants-Appellees.

No. 73-3569
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

March 14, 1974.

Condemnee brought civil rights action against condemning public utility, alleging denial of procedural due process in eminent domain proceeding in state trial court. The United States District Court for the Southern District of Georgia at Augusta, Anthony A. Alaimo, J., — F.Supp.—, granted defendant's motion for summary judgment, and plaintiff appealed. The Court of

* Rule 18, 5th Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York et al., 5th Cir., 1970, 431 F.2d 409, Part 1.

Appeals held that the proper forum for plaintiff's due process complaints was state appellate courts.

Affirmed.

Courts 489(1)

Proper forum for condemnee's complaints of denial of procedural due process in eminent domain proceeding in state trial court was state appellate courts.

Appeal from the United States District Court for the Southern District of Georgia.

Before WISDOM, GOLDBERG and GEE, Circuit Judges.

PERCURIAM:

The judgment of the district court is affirmed on the basis of the well-reasoned opinion below. Brown v. Georgia Power Co., — F.Supp. — (S.D.Ga.1973). The proper forum for plaintiff's troubling complaints of denial of procedural due process in the state trial court is the appellate courts of Georgia.

Affirmed.

App. 3

ORDER GRANTING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT

(Number and Title Omitted) (Filed Aug. 16, 1973)

Plaintiff, smarting over the condemnation of his land by the defendant, public utility, brings this action under the Civil Rights Act and its jurisdictional counterparts,[1] claiming that the utility, acting under color of the state

---

[1] 28 U.S.C. S 1331 provides in pertinent part:

"(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs and arises under the Constitution, laws, or treaties of the United States."

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the

(continued on next page)

law of Eminent Domain, deprived him of rights secured to him by the Fifth and Fourteenth Amendments to the United States Constitution.

Defendant moves alternatively for judgment on the pleadings or summary judgment under Fed. R. Civ. P. 12(c) thereby opposing the question for decision here.

---

1 (Continued)

28 U.S.C. S 1343 provides in pertinent part:

United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

42 U.S.C. S 1983 provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any

(continued on next page)

The facts in the record, which are deemed to present a sufficient basis for summary disposition of the case, are as follows:

After unsuccessful attempts at purchasing the plaintiff's property in Burke County, the defendant a public utility, filed a condemnation action in the Superior Court of Burke County on August 11, 1971. [2] By court order of that date, a Special Master was appointed to receive evidence upon the issues pursuant to Ga. Code Ann. Chapter 36-6A. A hearing was held before the Special

---

1 (Continued)

42 U.S.C. S 1983 provides:

State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

---

2 see Ga. Code Ann., Title 36, Eminent Domain.

Master on August 31, 1971. During the course of that hearing, counsel for the plaintiff raised the constitutional issue concerning the necessity for the taking. The Special Master rejected that argument following an evidentiary hearing as to value. On September 2, 1971, the Special Master filed his award and a judgment was entered thereupon by the Burke County Superior Court. On September 10, 1971, the plaintiff filed an answer and appeal to the Superior Court of Burke County. Subsequently, pursuant to motion of the defendant, the Burke County Superior Court entered an order striking the answer in its entirety and all references to constitutional issues in the appeal. The appeal, as limited to the issue of the amount of the award by order of the Burke County Superior Court of April 19, 1972, was tried on August 28, 1972. The judgment of that trial in the amount of Seventy Thousand Dollars ($70,000) was entered on August 29, 1973. Of that amount, the plaintiff herein has accepted Fifty-Five Thousand Seven Hundred Fifty Dollars ($55,750) and Fifteen Thousand Two Hundred Sixty-Nine Dollars and Thirty-four cents ($15,269.34) remains on deposit with the Clerk of the Superior Court of Burke County for the benefit of the plaintiff.

There was no appeal from this judgment to the Appellate Courts of Georgia.

The plaintiff submits that he states a cause of action under 42 U.S.C. S 1983 because he has been deprived of his right under the Fourteenth Amendment to the United States Constitution to notice and an opportunity to be heard on the constitutional issues raised before the Special Master. The plaintiff complains that his constitutional arguments were foreclosed by the order of the Burke County Superior Court of April 19, 1972, for failure of the plaintiff to except to the findings of the Special Master before entry of judgment thereupon. The plaintiff notes, however, that he was foreclosed from excepting to the findings of the Special Master because no notice thereof was served upon him before entry of the judgment thereupon. This failure of notice of the findings of the Special Master is arguably violative of the plaintiff's procedural due process rights which, in the proper forum, may subject the statutory procedure utilized by the State of Georgia to Constitutional scrutiny, facially and as applied. The proper forum in this instance, however, should have been the Appellate Courts of Georgia and the failure of the

plaintiff to avail himself of his opportunity to challenge the procedure complained of by direct attack operates to bar collateral consideration of the issues upon the familiar doctrine of res-judicata.

The Fifth Circuit in In Re Constructors of Florida, Inc., 349 F. 2d 595 (5 Cir. 1965), considered the doctrine of res-judicata to embody two main rules which were stated at p. 599, as follows:

> "(1) The final judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and their privies to the litigation, and constitutes a bar to a new action or suit upon the same cause of action either before the same or any other tribunal.
>
> "(2) Any right, fact or matter in issue and directly adjudicated, or necessarily involved in the determination of an action before a competent court in which a judgment or decree has been rendered upon the merits, is conclusively settled by the judgment therein and cannot again be litigated between the same parties

> and their privies, whether the claim, demand, purpose or subject-matter of the two suits is the same or not."

Thus, the res-judicata inquiry, here, concerns wheter the plaintiff was a party to a prior adjudication by a court of competent jurisdiction embodied in a final judgment upon the merits of the claims raised by the pleading herein. The allegations sub judice state the claims that the defendant acted ultra vires in the condemnation of the plaintiff's property under color of the law of the State of Georgia and further caused the plaintiff to be denied procedural due process by failing to allow time for service of the Special Master's findings upon the plaintiff before seeking judgment upon said findings. These claims were necessarily disposed of by the state proceedings.

A careful analysis of the state court record fails to reveal any consideration during the state proceedings of the issue as to the defendant's power under Ga. Code Ann. Chapter 36-6A to condemn the plaintiff's property in fee simple. Such failure, however, cannot prevent operation of the doctrine of res judicata in regard to that issue. The rule is well-

settled that "The judgment is conclusive, not only as to matters which were decided, but also as to all matters which might have been decided." Clark v. Redeker, 406 F.2d 883, 885 (8 Cir. 1969). Accord Harrison v. Bloomingfield Bldg. Industries, Inc., 435 F.2d 1192 (5 Cir. 1970); Rankin v. State of Florida, 418 F.2d 482 (5 Cir. 1969), cert. denied 397 U.S. 1039. The foregoing rule is operative if the two actions are based upon the same cause of action. The cause of action asserted here is the same as asserted in the condemnation action though it was asserted defensively there because of the peculiar procedural nature of such proceedings. In comparing causes of action upon the issue of their identity, guidance is provided by Seadboard Coast Line R.R. v. Gulf Oil Corp., 409 F.2d 879, 881 (5 Cir. 1969):

> "The principle test for comparing causes of action is whether or not the primary right and duty, and the delict or wrong are the same in each action."

The right allegedly violated is the same in both actions; viz., the right to own and hold property fee from unlawful interference. Similarly, the wrong alleged is identical; that is, the

unconstitutional taking of the plaintiff's property. Thus, the court is compelled to conclude that the theory posited for the first time here, that the defendant acted beyond the scope of its statutory powers in condemning the plaintiff's property, could have been litigated in the first suit. The principle of res judicata prevents its being litigated here. See Wasoff v. American Automobile Ins. Co., 451 F.2d 767 (5 Cir. 1971).

The judgment barring this action was rendered by the Superior Court of Burke County on September 2, 1971. The procedure utilized by the defendant in obtaining that judgment is the object of the plaintiff's second claim herein that he has been denied procedural due process. By force of Georgia Law, all legal issues relating to the condemnation under the special statutory procedure established by Ga. Code Ann. Chapter 36-6A must be raised and determined in the Special Master proceeding. If no exceptions are taken to the Master's findings or no regular appeal taken from the judgment based on his award, the only issue remaining is that of value." Nodvin v. Georgia Power Co., 125 Ga. App. 821 (1972). The remedy for the correction of an adverse finding by the Special Master was perhaps best articulated by the

Georgia Court of Appeals in Wiggins v. City of Macon, 120 Ga. App. 197, 199-200 (1969):

> "The question naturally arises as to the remedy available, other than the jury appeal on valuation, for adverse rulings or findings by the special master with regard to such 'other matters material to their rights.' In this regard the statute attempts at the outset to achieve a more perfect conciliation between the parties by providing for the use of experienced, competent attorneys as special masters. But the statute provides that 'his relation and accountability to the court shall be that of an auditor or master in the general practice existing in this State.' (Emphasis supplied). Code Ann. S 36-606a. Thus his rulings and findings are not immediately final. The statute obviously contemplates that, as with auditors, a special master's rulings and findings may be excepted to in the trial court and disposed of in like manner before any award, which is the end product of the proceeding, is offered to the court and a judgment of taking is entered up based on the award."

The plaintiff herein alleges, in essence, that the defendant by causing a final judgment to be entered on the same day as the filing of the findings and before notice to the plaintiff of said findings, deprived plaintiff of an opportunity to preserve his Constitutional challenge, and that such action by the defendant has denied him the right to procedural due provess of law, guaranteed him by the United States Constitution. This action is said to have been taken under color of law and, therefore, actionable under 42 U.S.C. S 1983.

This is, indeed, an ingenious argument; but its ingenuity will not avail to dispel the bar of res judicata.

The state court's foreclosure of the constitutional issue which the plaintiff sought to raise there is res judicata upon the merits of the substantive issue as well as the procedural question concerning the method of entry of judgment. State courts are competent to decide federal constitutional questions and a state court determination upon the merits of such issues is res judicata absent an appeal through the state appellate system and ultimately to the United States Supreme Court. The

doctrine of res judicata is designed to foreclose collateral attacks such as is attempted here and to insure the integrity of judgments rendered by courts of competent jurisdiction.

The landmark case of Angel v. Bullington, 330 U.S. 183 (1947) was a diversity action for a deficiency arising from the sale of a parcel of Virginia realty upon default of a note secured by a deed of trust. The plaintiff, Bullington, sued the defendant in the latter's State of North Carolina. The action was demurrable, however, upon the basis of a North Carolina statute barring recovery of such deficiency judgments as interpreted by the North Carolina Supreme Court. Bullington, rather than seeking review in the United States Supreme Court, filed suit for the deficiency in the district court. Bullington obtained the judgment there and the Fourth Circuit affirmed. The Supreme Court reversed holding the federal action to have been barred by the state judgment upon the doctrine of res judicata. Acknowledging that the allowable "limitation of the jurisdiction of the courts" of a state could present an issue of constitutional dimensions cognizable in federal courts, the Court nevertheless felt compelled to accord res judicata

effect to the North Carolina judgment because the plaintiff, by failing to appeal that judgment to the United States Supreme Court, had allowed the state court to conclusively adjudicate the federal question. The Court noted at pages 189-190:

> "For the purposes of litigating the issues in controversy in the North Carolina action, the North Carolina Supreme Court was an intermediate tribunal. If a litigant chooses not to continue to assert his rights after an intermediate tribunal has decided against him, he has concluded his litigation as effectively as though he had proceeded through the highest tribunal available to him . . . He forewent his right to have a higher court, this Court, enable him to win his chance by holding that he was right and that the North Carolina Supreme Court was wrong. He cannot begin all over again in an action involving the same issues before another forum in the same State."

The absence of a specific ruling in the state court upon the plaintiff's claim concerning his

procedural due process rights cannot alter the res judicata effect accorded the resolution of this issue. Although the record fails to indicate that the state court specifically ruled upon the issue, a holding adverse to the claim is implicit in the judgment. This concept is explained in Angel, supra, at page 190:

> "The 'merits' of a claim are disposed of when it is refused enforcement. If an asserted federal claim is denied enforcement on a professed local ground, but a socalled local ground which is subject to review here because it is in fact the adjudication of a federal question, then the 'merits' is relevant to the principles of res judicata. A State court cannot sterilize federal claims by putting on the adjudication a local label."

Angel, supra, read in a vacuum cannot be dispositive of the issue here primarily because of the distinguishable jurisdictional basis. As noted by the Angel court at page 192:

> "Of course, where resort is had to a federal court not on grounds of diversity

> of citizenship but because a federal right is claimed, the limitations upon the courts of a State do not control a federal court sitting in the State."

Casting the complaint upon a civil rights jurisdictional basis, however, cannot operate to avoid the thrust of Angel that conclusively litigated federal questions are res judicata. In Mertes v. Mertes, 350 F. Supp. 472 (D. Del. 1972), a state divorce action was in issue. For the first time on appeal, the husband challenged a Delaware statute providing for division of property upon the constitutional guarantees of due process and equal protection of the law. The Delaware Supreme Court affirmed the lower court while refusing to reach the constitutional issue because it had not been raised in the lower court. The plaintiff then brought an action in the federal district court basing his complaint upon 42 U.S.C. S 1983. This action was held to be barred by the doctrine of res judicata upon the authority of Hilliard v. Commonwealth of Pennsylvania, 308 F. Supp. 756 (W.D. Penn. 1970) and Angel, supra. The court further noted that res judicata is equally applicable where the action is brought under the Civil Rights Act. Accord Bricker v. Crane,

468 F. 2d 1228, 1231 (1 Cir. 1972), wherein the court noted:

> "In P.I. Interprises, Inc. v. Cataldo, 457 F.2d 1012 (1 Cir. 1972), this court held that the effects of collateral estoppel cannot be avoided by recasting an adjudicated issue in the form of an action under the Civil Rights Act. We noted in that decision the well-settled principle that state courts are fully empowered to decide federal claims and that 'a state court decision on constitutional issues is res judicata to the identical suit brought in federal court.' Id. at p. 1014. We reiterate that the Civil Rights act is not a vehicle for collateral attack upon final state court judgments, Coogan v. Cincinnati Bar Association, 431 F.2d 1209 (6 Cir. 1970); Rhodes v. Meyer, 334 F.2d 709, 716 (8 Cir.), Cert. denied, 379 U.S. 915 (1964), and that a writ of certiorari to the United States Supreme Court is the only method by which a decision may be reviewed."

A case closely analogous to the matter at bar

is Hilliard v. Commonwealth of Pennsylvania, supra. There the Pennsylvania Game Commission, having failed in negotiations for the purchase of the plaintiff's land for use in a conservation project, condemned in fee the entire property. Preliminary objections to the Declaration of Taking were filed and an opinion was entered sustaining one such objection. Simultaneously with the Court's order, the Game Commission was granted leave to amend the Declaration of Taking in light of the condemnee's sustained objection. Thereafter, an amended Declaration of Taking was filed and the condemnee entered a second set of Preliminary Objections which were constitutional in nature. These were dismissed upon the authority of S 406(c) of the Pennsylvania Eminent Domain Code of 1964, which provides that all preliminary objections must be raised at one time. The condemnees appealed that dismissal order to the Supreme Court of Pennsylvania where the judgment was affirmed per curiam. No petition for certiorari was filed to the United States Supreme Court but rather an injunctive action was commenced in the district court. The court, noting that "jurisdiction is founded solely upon the alleged existence of numerous questions arising under the Fourteenth Amend-

ment to the United States Constitution" found that it had subject matter jurisdiction upon the allegation that the Game Commission had abused its discretion and acted in bad faith in violation of the constitutional stricture on arbitrariness, capriciousness or bad faith. Nevertheless, the Court dismissed the complaint by reason of the doctrine of res judicata. The Court held that the Pennsylvania Eminent Domain Code of 1964 afforded the plaintiffs an opportunity, which had been waived by the plaintiffs' failure to abide by the prescribed procedure, to raise all issues whether constitutional in nature or otherwise. The state procedural ruling was held to be an adjudication on the merits of the substantive constitutional issues on the authority of Angel, supra. Furthermore, the court held that the issue raised by the due process challenge to the procedural ruling was cognizable in the state courts on direct attack and in the Supreme Court of the United States on petition for certiorari. Thus, such an attack in a federal district court was collateral and conclusively barred by Angel.

There is no suggestion in the record sub judice that the appellate courts of the State of Georgia were closed to the plaintiff. Thus,

the foregoing considerations must be given force here and deference is accorded the conclusive judgment of the state court.

It follows, then, that the defendant's motion treated herein as a motion for summary judgment pursuant to Rule 12(c), Fed. R. Civ. P.,[3] is granted.

It is so Ordered.

This 15th day of August, 1973.

s/Anthony A. Alaimo
United States District Judge

NOTICE OF APPEAL

(Number and Title Omitted) (Filed Sep 14, 1973)

Now comes the Plaintiff and appeals to the United States Court of Appeals for the Fifth Circuit from the Judgment of the Court entered on the 16th day of August, 1973.

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[3] See also, Holmes v. United States, 353 F.2d 785 (5 Cir. 1965).

This 31 day of Aug, 1972.

s/Percy J. Blount

. . .oOo. . .

S 36-614a EMINENT DOMAIN

36-614a. Appeal to superior court; jury trial; further procedure.—In case either party, or the representative of either party is dissatisfied, he or they may, within 10 days from the time the award is filed, enter in writing an appeal from the award to the superior court of the county where the award is filed; and at the term succeeding the filing of the appeal, it shall be the duty of the judge to cause an issue to be made and tried by a jury as to the value of the property taken or the amount of damage done, with the same right to move for a new trial and file a bill of exceptions as in other cases at law. The entering of said appeal and the proceedings thereon shall not hinder or delay in any way the condemning body's work or the progress thereof (Acts 1957, pp. 387, 396)

STATE OF GEORGIA) IN THE SUPERIOR COURT
)
COUNTY OF BURKE) FOR SAID STATE AND
COUNTY

GEORGIA POWER COMPANY

CIVIL ACTION,
FILE NO. 512

CONDEMNOR

VS.

APPEAL TO THE
SUPERIOR COURT

228.8 Acres in the 66th GM District, Burke County, Georgia, and

S.K.BROWN, 3019 Park Ave., Augusta, Georgia

CONDEMNEE

Now comes S. K. BROWN, condemnee in the above styled action, and being dissatisfied with the award made by the Honorable R.U. Harden, the special master therein, and filed by him on the 2nd day of September, 1971,

and within ten days from the time the award was filed, enters this the condemnee's appeal from said award to Superior Court of Burke County, as provided in Georgia Code Annotated 36-614a, and further states:

1.

That under laws of the State of Georgia, more specifically, Georgia Code Annotated 36-801, Georgia Power does not have the power of eminent domain to condemn the 228.8 acres of land in question for a nuclear power facility.

2.

That said condemnor has condemned condemnee's prime property for the purpose of erecting a Six Hundred Million ($600,000,000.00) Dollar electric power facility.

3.

That it is not necessary or in the public interest for the said condemnor to take the said 228.8 acres of land in question.

4.

Said condemnor is attempting to deprive condemnee of his property without due process of law, and deprive condemnee of his property under the misrepresentation of eminent domain, without just compensation. Condemnor is willing to expend large sums of money extracted from the public as a public utility, but is unwilling to pay condemnee reasonable prices for his industrial property.

5.

That the condemnation of the said 228.8 acres in question was taken from condemnee in violation of his rights under the Constitution of the United States and the State of Georgia, more specifically, his right not to have his property taken without due process of law and just compensation.

(s)_____
Glenn B. Hester
Attorney for Condemnee

(s)_____
J. Carlisle
Attorney for Condemnee

(continued on next page)

OF COUNSEL:

Sanders, Hester, Holley,
Askin & Dye
206 7th Street
Augusta, Georgia

(Certificate of Service)

Filed in Office
This 9th Day of
Sept. 1971
Clerk, Superior Court
Burke County, Ga.

CHAPTER 36-8. CONDEMNATION, ETC., BY POWER COMPANIES.

Sec.

36-801. Water power owners may purchase, lease, or condemn easements; payment of compensation.
36-802. Payment of compensation or damages.
36-803. "Public road" and "public highway" defined.
36-804. Acquisition of right to flood roads and highways.
36-805. Appeal to superior court.
36-806. Rights pending the appeal.
36-807. Right of action of owner of damaged property not prejudiced.
36-808. Condemnation of road or highway. Notice.
36-809. Procedure. Officers notified to act for State or county.
36-810. Condemned road not to be used until new road approved.
36-811. When and how interest in property may be condemned.
36-812. Acquistion of certain mills, factories, etc.

36-801. (5240) Water power owners may pur-

chase, lease, or condemn easements; payment of compensation.—Any corporation or individual owning or controlling any water power, or location for steam plant hereinafter mentioned, and operating or constructing or preparing to construct thereon a plant or works for generating electricity by water or steam power, to be used for the purpose of lighting towns or cities, or supplying motive power to railroad or street car lines, or supplying light, heat or power to the public, shall have the right to purchase, lease or condemn rights-of-way or other easements over the lands of others in order to run lines of wires, maintain dams, flow backwater or for other uses necessary to said purposes, upon first paying just compensation to the owner of the land to be affected. (Acts 1897, p. 68.)

STATE OF GEORGIA) IN THE SUPERIOR COURT
)
COUNTY OF BURKE) FOR SAID STATE AND
COUNTY

GEORGIA POWER COMPANY

CIVIL ACTION,
FILE NO. 512

CONDEMNOR

VS.

228.8 Acres in the 66th GM District, Burke County, Georgia, and

S. K. BROWN, 3019 Park Avenue, Augusta, Georgia ET Al.,

ORDER OF COURT TO STRIKE PORTIONS OF CONDEMNEE'S NOTICE OF APPEAL

CONDEMNEE

The motion of Condemnor, Georgia Power Company, in the above cause to strike por-

tions of Condemnee's notice of appeal having come on for hearing and after argument of counsel it is:

CONSIDERED, ORDERED AND ADJUDGED that said motion be, and the same is hereby granted, and paragraphs:

One (1), two (2), three (3), four (4), and five (5) of Condemnee's "Appeal to the Superior Court" of Burke County, Georgia, are hereby stricken and ordered expunged from the record in said cause.

Counsel for Condemnee is hereby directed to prepare and file a revised notice of appeal within thirty days from date of this order pursuant hereto.

(s)_____
J.S.C.A.C.

FILED IN OFFICE
THIS 24th DAY OF
April, 1972
Clerk, Superior Court
Burke County, Ga.

An examination of the Certified Record in this cause reveals that there is not present in that Record any Notice of any Hearing in the Superior Court of Burke County, Georgia preceeding the two orders filed the 24th day of April 1972, striking from Condemnee's Notice of appeal and Condemnee's Record all reference to the Constitutional questions and legality of the taking by Georgia Power Company.

IN THE SUPERIOR COURT OF

BURKE COUNTY, GEORGIA

GEORGIA POWER COMPANY
CIVIL ACTION, FILE NO. 512
VS.

228.8 Acres in the 66th GM
District, Burke County,
Georgia, and

S.K. BROWN, 3019 Park Avenue,
Augusta, Georgia

FARMERS PRODUCTION CREDIT ASSOCIATION, 6th Street, Waynesboro, Georgia,

HONORABLE MRS. MARY O. HERRINGTON Ordinary Burke County, Georgia

HONORABLE MRS. JOHN R. DINKINS Tax Commissioner, Burke County, Georgia

SAM STORY MOBLEY, Waynesboro, Georgia

BURKE COUNTY HUNTING CLUB, Waynesboro, Georgia

BURNIS COLEMAN, RFD, Waynesboro, Georgia

Now comes S.K. BROWN and 228.8 acres, Condemnees in the above styled action, and file this their answer to Petitioner's petition for condemnation.

1.

Condemnee admits that part of para-

graph one of Condemnor's petition that Condemnor is chartered only to produce electricity by water and steam power, but is without sufficient information or knowledge to form a belief as to the truth of the facts alleged in the remainder of paragraph one.

2.

Condemnee is without sufficient information or knowledge to form a belief as to the truth of the facts alleged in paragraph two, but furth states that if Condemnor has possible violated its rights under eminent domain in other areas since Condemnor is proceeding outside of its rights and powers in this action.

3.

Condemnee is without sufficient information or knowledge to form a belief as to the truth of the facts alleged in paragraph three as to Condemnor's petition, but denies that the said area described in paragraph three is 228.8 acres.

4.

Condemnee denies paragraph four of Condemnor's petition, and further states that Condemnor is taking condemned property in violation of the Constitution of the United States and the State of Georgia as to due process of law and just and adequate compensation.

5.

Condemnee is without sufficient information or knowledge to form a belief as to the truth of the facts alleged in paragraph five of Condemnor's petition.

6.

Condemnee denies paragraph six of Condemnor's petition.

7.

Condemnee admits that part of paragraph seven that a Special Master was appointed in these proceedings, but denies that part of paragraph seven that there is a necessity for a quick and effective determination of the just

and adequate compensation to be paid to Condemnee for the lands sought to be condemned in this action.

8.

Condemnee admits paragraph eight of Condemnor's petition.

Condemnee admits paragraph nine of Condemnor's petition.

(s)_____
Glenn B. Hester
Attorney for Condemnee
(s)_____
J. Carlisle Overstreet
Attorney for Condemnee

This is to certify that I have, prior to filing, served a copy of the within and foregoing pleading on opposing counsel as required by law.
Sanders, Hester, Holley, Ashmore & Boozer

FILED IN OFFICE
THIS 10th DAY OF
Sept. 1971
Clerk, Superior Court
Burke County, Ga.

STATE OF GEORGIA) IN THE SUPERIOR COURT
)
COUNTY OF BURKE) FOR SAID STATE AND COUNTY

GEORGIA POWER COMPANY — CONDEMNOR — CIVIL ACTION, FILE NO. 512

VS.

228.8 Acres in the 66th GM District, Burke County, Georgia, and

S. K. BROWN, 3019 Park Avenue, Augusta, Georgia ET AL., — CONDEMNEE

ORDER TO STRIKE CONDEMNEE'S ANSWER

The motion of Georgia Power Company, Condemnor, in the above cause to strike the Condemnee's answer filed in the Superior Court

of Burke County, Georgia, on Condemnee's appeal to the Superior Court of Burke County, Georgia, having come on for hearing and after argument of counsel it is:

CONSIDERED, ORDERED AND ADJUDGED that said motion be, and the same is hereby granted, and the clerk of said court is hereby ordered to strike and expunge said answer from the record in said cause. This 19th day of April, 1972.

(s) _____
J.S.C.A.C.

FILED INOFFICE
THIS 24th DAY OF
APRIL 1972
Clerk, Superior Court
Burke County, Ga.

IN THE SUPERIOR COURT OF
BURKE COUNTY, GEORGIA

GEORGIA POWER COMPANY
versus
CIVIL ACTION FILE NO. 512
In Rem Condemnation Proceedings

All that tract or parcel of land situate, lying and being in the 66th G.M. District of Burke County, Georgia, and being more particularly described as follows: BEGINNING at an iron pin corner common to lands of James Mathis and lands of S.K. Brown, said corner having a co-ordinate value of X 624,998.938 and Y 1,147,251.011 as determined by the Plane Co-ordinates of "The Georgia Co-ordinate System, East Zone", said corner is located on the Westerly edge of the Savannah River; thence from said Point of Beginning Southeasterly along the Westerly edge of said River the following bearings and distances: South 47 deg. 31' 20" East 458.20 feet to a point; thence South 39 deg. 39' 03" East 280.45 feet to a point; thence South 35 deg. 18' 18" East 278.45 feet to a point; thence South 30 deg. 41' 43" East 156.16 feet to a point; thence South 42 deg. 02'08" East 246.83 feet to a

point; thence South 34 deg. 59; 38;; East 326. 48 feet to a point; thence South 35 deg. 55' 19'' East 294.47 feet to a point; thence South 40 deg. 45' 21' East 470.85 feet to an iron pin; thence leaving said Westerly edge of said River South 42 deg. 18' 01'' West along the dividing line between lands of Kimberly-Clark Corporation and lands of S.K. Brown 2418.45 feet to an iron pin; thence South 59 deg. 18' 01'' West along said dividing line 1683.75 feet to an iron pin; thence South 59 deg. 18' 01'' West along the dividing line between lands of Roberts-Augusta, Inc. and lands of S.K. Brown 261.25 feet to an iron pin; thence North 26 deg. 40' 03'' West along the dividing line between lands of Elizabeth Barefield and lands of S.K. Brown 2606.23 feet to an iron pin; thence North 63 deg. 47' 27'' East along the dividing line between lands of Charlie Mathis and lands of S.K. Brown 1167.97 feet to an iron pin; thence North 63 deg. 42' 41'' East along the dividing line between lands of Daisy Harper and lands of S.K. Brown 234.80 feet to an iron pin; thence North 53 deg. 56' 22'' East along said dividing line 276.76 feet to an iron pin; thence North 53 deg. 56' 22'' East along the dividing line between lands of James Mathis and lands of S.K. Brown 949.34

feet to an iron pin; thence North 45 deg. 16' 12" East along said dividing line 232.65 feet to an iron pin; thence North 27 deg. 49' 41" East along said dividing line 995.28 feet to an iron pin and the Point of Beginning, containing 228.8 acres, more or less, and being more particularly shown according to a plat of survey made for Georgia Power Company Land Department, prepared by George D. Tabakian, Registered Land Surveyor, dated August 6, 1971, attached hereto and made a part hereof.

The above described tract of land is all of that land lying and being in the 66th G.M. District of Burke County, Georgia, said tract is more particularly described in Deed dated April 14, 1964 from Burnis Coleman to S.K. Brown which is recorded in Deed Book 73, Page 597 in the Office of the Clerk of Superior Court of Burke County, Georgia.

AND

1. S.K. Brown, 3019 Harper Street, Augusta, Georgia

2. Farmers Production Credit Association,

6th Street, Waynesboro, Georgia

3. Honorable Mrs. Mary O. Herrington, Ordinary, Burke County, Georgia

4. Honorable Mrs. John R. Dinkins, Tax Commissioner, Burke County, Georgia

5. Sam Story Mobley, Waynesboro, Georgia

6. Burke County Hunting Club, Waynesboro, Georgia

7. Burnis Coleman, RFD, Waynesboro, Georgia

And
to any and all persons having or claiming any right or interest in and to said described lands.

to superior court of said county

NOW COMES the GEORGIA POWER COMPANY, of the State of Georgia, as Petitioner and Condemnor, and, in the exercise of its power of eminent domain, brings this action for condemnation in accordance with the

provisions of its Charter and the laws of the State of Georgia, in such cases made and provided, acting under proper corporate authority duly granted by its Board of Directors, and under the provisions and by the Authority of and Act of the General Assembly of Georgia, approved March 13, 1957 (Ga. Laws 1957, Page 387; Ga. Code Annotated Chapter 36-6A), as amended by Act Number 558 of the General Assembly of Georgia approved April 18, 1967 (Ga. Laws 1967, Page 825), and respectfully shows to the court:

1.

That Petitioner is a corporation chartered and organized under the laws of the State of Georgia, for the purpose of owning and controlling water powers, erecting dams, constructing steam plants, generating electricity by water and steam power, erecting and operating substations, transmission and distribution lines, transmitting and distributing electricity to be sold and used for lighting towns and cities, for supplying motive power to railroads street car lines and industries, for supplying light, heat and power to the public generally, both urban and rural, with the right to exercise eminent domain for the aforesaid purposes.

domain for the aforesaid purposes.

2.

That Petitioner owns and controls water powers, steam plants, substations, transmission and distribution lines in this state, and is operating said plants and works, generating electricity by water and steam plants, used for lighting cities and towns, supplying motive power to railroads, street car lines and industries, supplying light, heat and power to the public generally; that it owns, operates and maintains a system of electric generating plants, substations, transmission and distribution lines with wires, fixtures and appliances, including overhead and underground protective wires, is generating, transmitting, distributing and is proposing to generate, transmit and distribute electricity for the aforesaid purposes.

3.

This petition in rem is brought by the Georgia Power Company to acquire by condemnation the unencumbered fee simple title to the hereinafter described tract of land, together with all appurtenences and im-

provements located thereon, the same being required in order to construct, operate and maintain an electric generating plant and other necessary facilities which will become a component part of Georgia Power Company's network of generating, transmission and distribution system, and to prohibit any person, firm, or corporation from entering in or upon said tract, and will be for the public purpose of generating, transmitting, and distributing electric current to the public generally, said tract being described as follows:

> All that tract or parcel of land situate, lying and being in the 66th G.M. District of Burke County, Georgia, and being more particularly described as follows: BEGINNING at an iron pin corner common to lands of James Mathis and lands of S.K. Brown, said corner having a co-ordinate value of X 624,998.938 and Y 1,147,251.011 as determined by the Plane Co-ordinates of "The Georgia Co-ordinate System, East Zone", said corner is located on the Westerly edge of the Savannah River;thence from said Point of Beginning Southeasterly along the Westerly edge of said River the following bear-

ings and distances: South 47 deg. 31' 20" East 458.20 feet to a point; thence South 39 deg. 39' 03" East 280.45 feet to a point; thence South 35 deg. 18' 18" East 278.45 feet to a point; thence South 30 deg. 41' 43" East 156.16 feet to a point; thence South 42 deg. 02' 08" East 246.83 feet to a point; thence South 34 deg. 59' 38" East 326.48 feet to a point; thence South 35 deg. 55' 19' East 294.47 feet to a point; thence South 40 deg. 45' 21" East 470.85 feet to an iron pin; thence leaving said Westerly edge of said River South 42 deg. 18' 01" West along the dividing line between lands of Kimberly-Clark Corporation and lands of S.K. Brown 2418.45 feet to an iron pin; thence South 59 deg. 18' 01" West along said dividing line 1683.75 feet to an iron pin; thence South 59 deg. 18' 01" West along the dividing line between lands of Roberts-Augusta, Inc. and lands of S.K. Brown 261.25 feet to an iron pin; thence North 26 deg. 40' 03" West along the dividing line between lands of Elizabeth Barefield and lands of S.K. Brown 2606.23

feet to an iron pin; thence North 63 deg. 47' 27" East along the dividing line between lands of Charlie Mathis and lands of S.K. Brown 1167.97 feet to an iron pin; thence North 63 deg. 42' 41" East along the dividing line between lands of Daisy Harper and lands of S.K. Brown 234.80 feet to an iron pin; thence North 53 deg. 56'22" East along said dividing line 276.76 feet to an iron pin; thence North 53 deg. 56' 22" East along the dividing line between lands of James Mathis and lands of S.K. Brown 949.34 feet to an iron pin; thence North 45 deg. 16' 12" East along said dividing line 232.65 feet to an iron pin; thence North 27 deg. 49' 41" East along said dividing line 995.28 feet to an iron pin and the Point of Beginning, containing 228.8 acres, more or less, and being more particularly shown according to a plat of survey made for Georgia Power Company Land Department, prepared by George D. Tabakian, Registered Land Surveyor.

4.

Petitioner stands ready to pay just and adequate compensation for said tracts of land, apportenances, and improvements located thereon.

5.

The owners, lien holders, and any other persons known and unknown claiming any right, title, power, interest, ownership, equity, claim or demand in and to said land and all occupants, tenants, leasees, and licensees are made parties defendant to this action to the end that they may come into court and make claim to such interest or ownership or other right as they have in the same and to the proceeds arising therefrom.

6.

Because Petitioner believes that the title of the apparent or presumptive owner of such property is defective, doubtful, incomplete or in controversy; or that there are or may be persons unknown or non-resident who have or may have come claim or demand thereon, or

some actual or contingent interest or estate therein; or that there are minors or persons under disability who are or may be interested therein; or that there are taxes due or that should be paid thereon; and therefore, Petitioner has concluded that it is desirable to have a judicial ascertainment of any question connected with the acquisition by Petitioner of such lands by the exercise of the power of eminant domain, Petitioner brings this petition in this court, having jurisdiction of this action, for a judgment in rem against the above described property, condemning the same to the use of Petitioner, upon payment of just and adequate compensation therefore to the person or persons who may be found to be entitled to such payment.

7.

Petitioner shows that this is a case which, under the provisions of the aforesaid Act of the General Assembly requires the appointment of a Special Master, accountable to this Court and discharging his duties under its supervision, to determine and adjudge the fair and lawful, compensation to be paid the owners of said property under the provisions of the Constitution and laws of this State, it having been determined, by your Petitioner,

of the Constitution and laws of this State, it having been determined, by your Petitioner, that there is a necessity for a quick and effective determination of the just and adequate compensation to be paid to the owner or owners of the lands sought to be condemned as aforesaid.

8.

Petitioner shows that the above described tract of land sought to be condemned was conveyed from Burnis Coleman to S.K. Brown by Deed dated April 14, 1964 which is recorded in Deed Book 73, Page 597 in the Office of the Clark of Superior Court of Burke County, Georgia.

9.

Petitioner further shows that the above described lands are subject to the following Liens and Leases:

Deed to Secure Debt from Dr. S.K. Brown to Farmers Production Credit Association dated April 22, 1964 which is recorded in Deed Book 72, Page 444 in the office of the Clerk of Superior Court of Burke County, Ge-

orgia. Deed to secure Debt from S.K. Brown to Farmers Production Credit Association dated July 7, 1971 recorded in said Clerk's office in Deed Book 86, Page 217.

Deed to Secure Debt from Dr. S.K. Brown to Farmers Production Credit Association dated June 7, 1967 which is recorded in Deed Book 78, Page 406 in the Office of the Clerk of Superior Court of Burke County, Georgia. Sam Story Mobley claims ownership for his lifetime of a building on said property, which is not a matter of public record; and information has been furnished that Burke County Hunting Club has a hunting lease or rights that are not a matter of public record, and possible oral agricultural lease to Burnis Coleman.

10.

Petitioner alleges on information and belief that S.K. Brown is in possession of the said described property and as far as Petitioner has been able to ascertain, the names and addresses of all persons who may have or claim some right, title or interest in the land sought to be condemned or to be affted hereby are

1. S.K. Brown, 3019 Harper Street, Augusta, Georgia

2. Farmers Production Credit Association, 6th Street, Waynesboro, Georgia

3. Honorable Mrs. Mary O. Herrington, Ordinary, Burke County, Georgia

4. Honorable Mrs. John R. Dinkins, Tax Commissioner, Burke County, Georgia

5. Sam Story Mobley, Waynesboro, Georgia

6. Burke County Hunting Club, Waynesboro, Georgia

7. Burnise Coleman, RFD, Waynesboro, Georgia

WHEREFORE Petitioner prays as follows:

(a) For an order of this Court referring the issues herein made to a Special Master, and for the appointment of such Special Master;

(b) For an order of this Court requiring the defendants named herein and all persons known and unknown, who may claim or have an interest in said land, to appear before such Special Master at a time and place to be set by the Court, to make known their right, ownership and interest in said land, and their claims as to the value of same;

(c) That the order provide for a copy of this petition and of this order be served in the manner provided for in the said Act approved March 18, 1957 (Ga. Laws 1957, Page 387; Ga. Code Annotated Chapter 36-6A); as amended by an act approved March 10, 1966 (Ga. Laws 1966, Page 388; Ga. Code Section 36-610A) upon:

(1) The person in possession of the property, if any there be:

(2) Each person resident in the state of Georgia who is named in the petition as having a possible interest in said described property;

(3) The Ordinary of said County, who shall represent and act for any unknown owner, unborn remainderman, and for any minors, or other persons who are non compos mentis, or otherwise incompetent, who may have any title, interest, claim or demand in and against said land;

(4) Each person non-resident of the state of Georgia, if any there be, who is named in the petition as having a possible interest in said described property. The sheriff, or any lawful deputy of said County shall serve said non-residents by posting a copy of the petition together with this order on the bulletin board at the courthouse door of said County for not less than five days prior to the time of the hearing before the Special Master, and by the insertion of a notice, identifying the property sought to be con-

demned, as well as the date and place of the hearing before the Special Master, in the newspaper having general circulation in said County and being the same newspaper in which the sheriff's advertisements are published, and such publication to be made in at least one issue of such newspaper after the date of this order, and not less than four nor more than seven days before such hearing before the Special Master; and where the address of such non-residents is known, by mailing to them by registered mail a copy o f this petition and order;

(d) That such order require the Special Master to made an award as by the aforesaid statute provided, and to made a return of his actings and doings to connection therewith to this Court and that, upon payment of such award into the Registry of the Court, the Court decree and adjudge the absolute fee simple title in and to said lands, free of lien and encumbrance, to vest in Petitioner.

This 11th day of August, 1971.

GEORGIA POWER COMPANY
By:
Senior Vice President
Assistant Manager Land Department

IN THE SUPERIOR COURT OF
BURKE COUNTY, GEORGIA

GEORGIA POWER COMPANY
Versus
CIVIL ACTION FILE NO. 512
In Rem Condemnation Proceedings

228.8 acres in 66th G.M. District of
Burke County, Georgia
and
S.K. BROWN, et al

ORDER

The Foregoing petition read and considered. It is ordered that the same be filed.

It is further ordered that R.U. Harden, a competent attorney at law, residing in the Augusta Judicial Circuit and of more than three (3) years experience in the practice of law, is hereby appointed a Special Master in and for the Augusta Judicial Circuit to discharge

the duties of Special Master in this case as provided for by the Act of the General Assembly approved March 13, 1957, (Ga. Laws 1957, Page 387; Ga. Code Annotated Chapter 36-6A), as amended by Act Number 558 of the General Assembly of Georgia approved April 8, 1957 (Ga. Laws 1967, Page 825), and that he made and file in the Office of the Clerk of Superior Court of Burke County the oath and affidavit required by Section 8 of the aforesaid Act of the General Assembly.

It is further ordered that all persons owning or claiming any right, title, interest, claim or demand, or lienors, tenants, lessees or any other person at interest, in and to the land described in the foregoing petition, appear before such Special Master in Courtroom of the Burke County Courthouse in Waynesboro, Georgia, on the 24 day of August 1971, at 10 o'-clock, A.M. and then and there to make known their rights, title and claim, and the value thereof, and,

It is further order that, at such time and place, the Special Master herein named shall proceed to hear evidence as to the value of the property sought to be condemned, all as

provided by law, and that after hearing such evidence, and after making such personal inspection of the property as he may desire, such Special Master shall make and file with the Clerk of this Court an award and report of his findings, as provided for in the aforesaid Act of the General Assembly, and such award shall be filed with such Clerk within three (3) days from the date of such hearing, and,

It is further ordered that a copy of the petition and of this order be served in the manner provided for in the said Act approved March 13, 1957 (Ga. Laws 1957, Page 387; Ga. Code Annotated Chapter 36-6A), as amended by an Act approved March 10, 1966 (Ga. Laws 1966, Page 388; Ga. Code Section 36-610-A) upon:

(a) The person in possession of the property as described in the foregoing petition, if any there be;

(b) Each person resident in the State of Georgia who is named in the petition as having a possible interest in said described property;

(c) The Ordinary of said County who shall stand in the place of and protect the rights of all unknown parties, unborn remaindermen and for any minors, or other persons who are non compos mentis, or otherwise incompetent, who may have any title, interest, claim or demand in and against said property;

(d) Each person non-resident of the State of Georgia, if any, named in the petition as having a possible interest in said described property. The sheriff, or any lawful deputy of said County shall serve non-residents by posting a copy of the petition together with this order on the bulletin board at the courthouse door of said County for not less than five days prior to the time of the hearing before the Special Master, and by the insertion of a notice identifying the property sought to be condemned, as well as the date and place of the hearing before the Special Master, in The True Citizen, the official organ of said County for one issue, the date of which shall be not less than four nor more than seven days prior to said hearing before the Special Master, and where the address of such non-residents is known, by mailing to them by registered mail a copy of the petition and this order.

Dated this the 11th day of August, 1971

(s) _____
Judge of Superior Court
Augusta Judicial Circuit

SUPERIOR COURT
CIVIL ACTION FILE NO. 512

CITATION

GEORGIA, BURKE COUNTY.

TO:

1. S.K. Brown, 3019 Harper Street, Augusta, Georgia

2. Farmers Production Credit Association, 6th Street, Waynesboro, Georgia

3. Honorable Mrs. Mary O. Herrington, Ordinary, Burke County, Georgia

4. Honorable Mrs. John R. Dinkins, Tax Commissioner, Burke County, Georgia

5. Sam Story Mobley, Waynesboro, Georgia

6. Burke County Hunting Club, Waynesboro, Georgia

7. Burnis Coleman, RFD, Waynesboro, Georgia

And
to any and all other persons having or claiming any right, title of interest in and to the hereinafter described lands.

The GEORGIA POWER COMPANY has filed its petition to acquire by condemnation the unencumbered fee simple title to a tract of land for the purpose of locating an electric generating steam plant and other necessary facilities thereon, said tract is more particularly described below:

All that tract or parcel of land situate, lying and being in the 66th G.M. District of Burke County, Georgia, and being more particularly described as follows: BEGINNING at an iron pin corner common to lands of James

Mathis and lands of S.K. Brown, said corner having a co-ordinate value of X 624,998.938 and Y 1,147,251.011 as determined by the Plane Co-ordinates of "The Georgia Co-ordinate System, East Zone", said corner is located on the Westerly edge of the Savannah River; thence from said Point of Beginning Southeasterly along the Westerly edge of said River the following bearings and distances: South 47 deg. 31' 20" East 458.20 feet to a point; thence South 39 deg. 39' 03" East 280.45 feet to a point; thence South 35 deg. 18' 18" East 278.45 feet to a point; thence South 30 deg. 41' 43" East 156.16 feet to a point; thence South 42 deg. 02' 08" East 246.83 feet to a point; thence South 34 deg. 59' 38" East 326.48 feet to a point; thence South 35 deg. 55' 19" East 294.47 feet to a point; thence South 40 deg. 45' 21" East 470.85 feet to an iron pin; thence leaving said Westerly edge of said River South 42 deg. 18' 01" West along the dividing line between lands of Kimberly-Clark Corporation and lands of S.K. Brown 2418.45 feet to an

iron pin; thence South 59 deg. 18' 01'' West along said dividing line 1683.75 feet to an iron pin; thence South 59 deg. 18' 01'' West along the dividing line between lands of Roberts-Augusta, Inc. and lands of S.K. Brown 261.25 feet to an iron pin; thence North 26 deg. 40'03'' West along the dividing line between lands of Elizabeth Barefield and lands of S.K. Brown 26-06.23 feet to an iron pin; thence North 63 deg. 47' 27'' East along the dividing line between lands of Charlie Mathis and lands of S.K. Brown 1167.97 feet to an iron pin; thence North 63 deg. 42' 41'' East along the dividing line between lands of Daisy Harper and lands of S.K. Brown 234.80 feet to an iron pin; thence North 53 deg. 56' 22'' East along said dividing line 276.76 feet to an iron pin; thence North 53 deg. 56' 22'' East along the dividing line between lands of James Mathis and lands of S.K. Brown 949.34 feet to an iron pin; thence North 45 deg. 16' 12'' East along said dividing line 232.65 feet to an iron pin; thence North 27 deg. 49' 41'' East along said

dividing line 995.28 feet to an iron pin and the Point of Beginning, containing 228.8 acres, more or less, and being more particularly shown according to a plat of survey made for Georgia Power Company Land Department, prepared by George D. TABAment, prepared by George D. Tabakian, Registered Land Surveyor, dated August 6, 1971, attached to said petition.

The above described tract of land is all of that land lying and being in the 66th G.M. District of Burke County Georgia, said tract is more particularly described in Deed dated April 14, 1964 from Burnis Coleman to S.K. Brown which is recorded in Deed Book 73, Page 597 in the Office of the Clerk of Superior Court of Burke County, Georgia.

NOW, THEREFORE, you and each of you are required to be and appear before R.U.Harden, Special Master in Courtroom Burke County Courthouse in Waynesboro, Georgia, on the 24 day of August, 1971, at 10 o'clock A.M. to make known your rights or interest, if any, in and to said described property and your

claims of the value thereof, and any other matters material to your respective rights.

Witness the Honorable William M. Fleming, Jr., Judge, Superior Court, Augusta Judicial Circuit, this the 11th day of August 1971.

(s)_____

Clerk, Superior Court, Burke County, Georgia

GEORGIA, RICHMOND COUNTY

I have this day served the Condemnee, S.K. BROWN at 7:49 p.m., 3019 Park Lane, personally, with a copy of the within petition and order.

This 12th day of August, 1971.

(s)_____

Deputy Sheriff

IN THE SUPERIOR COURT OF
BURKE COUNTY, GEORGIA

CIVIL ACTION, FILE NO. 512

GEORGIA POWER COMPANY

VS.

228.8 acres in the 66th GM District, Burke County, Georgia, and

S.K. BROWN, 3019 Park Avenue, Augusta, Georgia

FARMERS PRODUCTION CREDIT ASSOCIATION, 6th Street, Waynesboro, Georgia

HONORABLE MRS. MARY O. HERRINGTON, Ordinary, Burke County, Georgia

HONORABLE MRS. JOHN R. DINKINS, Tax Commissioner, Burke County, Georgia

SAM STORY MOBLEY, Waynesboro, Georgia

BURKE COUNTY HUNTING CLUB, Waynesboro, Georgia

BURNIS COLEMAN, RFD, Waynesboro, Georgia.

AN ORDER

It appearing that Glenn B. Hester, attorney for S.K. BROWN and 228.8 acres having just been employed on August 16, 1971, by said S.K. BROWN and 228.8 acres, IT IS ORDERED, as agreed by all parties concerned, that the attorney for S.K. BROWN and 228.8 acres shall have a 5-day continuance from the date of this Order to thoroughly prepare and familiarize themselves with all facets of the above captioned proceeding.

IT IS FURTHER ORDERED that the hearing before a Special Master be continued for the 5-day period herein described, and as set out under Georgia Code Annonated, Title 36, Section 611-a, and the hearing to be set for August 31, 1971, at 11:00 A.M. in Burke County, Georgia.

This 23rd day of August, 1971.

(s)_____
William M. Fleming, Jr., Judge of the
Superior Courts of the Augusta Judicial
Circuit

IN THE SUPERIOR COURT OF
BURKE COUNTY, GEORGIA

GEORGIA POWER COMPANY
versus
CIVIL ACTION FILE NO. 512
In Rem Condemnation Proceedings

RETURN OF SPECIAL MASTER

I, R.U. HARDEN, the Special Master appointed and chosen by the Court to hear evidence, give full consideration to all matters touching upon the value of the property sought to be condemned, as shown by the description of the property in the case of Georgia Power Company, Condemning Body, versus

> All that tract or parcel of land situate, lying and being in the 66th G.M. District of Burke County, Georgia, and being more particularly described as follows: BEGINNING at an iron pin corner common to lands of James Mathis and lands of S.K. Brown, said corner having a co-ordinate value of X 624,998.938 and Y 1,147,251.011 as determined by the Plane Co-ordinates of "The Georgia Co-

ordinate System, East Zone", said corner is located on the Westerly edge of the Savannah River; thence from said Point of Beginning Southeasterly along the Westerly edge of said River the following bearings and distances: South 47 deg. 31' 20" East 458.20 feet to a point; thence South 39 deg. 39' 03" East 280.45 feet to a point; thence South 35 deg. 18' 18" East 278.45 feet to a point; thence South 30 deg. 41' 43" East 156.16 feet to a point; thence South 42 deg. 02' 08" East 246.83 feet to a point; thence South 34 deg. 59' 38" East 326.48 feet to a point; thence South 35 deg. 55' 19" East 294.47 feet to a point; thence South 40 deg. 45' 21" East 470.85 feet to an iron pin; thence leaving said Westerly edge of said River South 42 deg. 18' 01" West along the dividing line between lands of Kimberly-Clark Corporation and lands of S.K. Brown 2418.45 feet to an iron pin; thence South 59 deg. 18' 01" West along said dividing line 1683.75 feet to an iron pin; thence South 59 deg. 18' 01" West along the dividing line between lands of Roberts-

Augusta, Inc. and lands of S.K. Brown 261.25 feet to an iron pin; thence North 26 deg. 40' 03' West along the dividing line between lands of Elizabeth Barefield and lands of S.K. Brown 2606.23 feet to an iron pin; thence North 63 deg. 47' 27" East along the dividing line between lands of Charlie Mathis and lands of S.K. Brown 1167.97 feet to an iron pin; thence North 63 deg. 42' 41" East along the dividing line between lands of Daisy Harper and lands of S.K. Brown 234.80 feet to an iron pin; thence North 53 deg. 56' 22" East along said dividing line 276.76 feet to an iron pin; thence North 53 deg. 56' 22" East along the dividing line between lands of James Mathis and lands of S.K. Brown 949.34 feet to an iron pin; thenceNorth 45 deg. 16' 12" East along said dividing line 232.65 feet to an iron pin; thence North 27 deg. 49' 41" East along said dividing line 995.28 feet to an iron pin and the Point of Beginning, containing 228.8 acres, more or less, and being more particularly shown according to a plat of survey made for Georgia Power Company Land Department, prepared by George D. Tabakian, Registered Land Surveyor,

ding to a plat of survey made for Georgia Power Company Land Department, prepared by George D. Tabakian, Registered Land Surveyor, dated August 6, 1971, attached to said petition.

The above described tract of land is all of that land lying and being in the 66th G.M. District of Burke County, Georgia, said tract is more particularly described in Deed dated April 14, 1964 from Burnis Coleman to S.K. Brown which is recorded in Deed Book 73, Page 597 in the Office of the Clerk of Superior Court of Burke County, Georgia.

AND

1. S.K. Brown, 3019 Harper Street, Augusta, Georgia

2. Farmers Production Credit Association, 6th Street, Waynesboro, Georgia

3. Honorable Mrs. Mary O. Herrington, Ordinary, Burke County, Georgia

4. Honorable Mrs. John R. Dinkins, Tax Commissioner, Burke County, Georgia

5. Sam Story Mobley, Waynesboro, Georgia

6. Burke County Hunting Club, Waynesboro, Georgia

7. Burnish Coleman, RFD, Waynesboro, Georgia

RETURN OF SPECIAL MASTER (continued)
CIVIL ACTION FILE NO. 512

and having first taken the oath as required by law of the Special Master, the same having been filed with the Clerk of the Superior Court of Burke County, which is the county of my residence and having heard evidence under oath and given consideration to the value of such property on the 31st day of August, at 11 o'clock A.M., as provided for in the order of the Court, do decide and recommend to the Court as follows, to wit:

1. I find and award to S.K. Brown, Condemnee, the sum of $55,750.00 as the actual

value of the property sought to be condemned, except as to a clubhouse on the property which the said S.K. Brown stipulated to be the property of Sam Story Mobley and which the said Sam Story Mobley and Condemnor stipulated to have a value of $3,000.00, and I therefore find and award to the said Sam Story Mobley, Condemnee, the sum of $3,000.00 as the actual value of said clubhouse; and I further find and award to Burnis Coleman, Condemnee, the tenant farming said lands, the sum of $1,750.00 as the actual value of the crops of said tenant on the lands sought to be condemned, it having been stipulated that this is the value of the crops that had been agreed upon by the Condemnor and said Burnis Coleman;

2. I find consequential damages to the remaining property in the amount of $ NONE;

3. I find consequential benefits to the remaining property in the amount of $ NONE;

4. Balancing the consequential benefits against the consequential damages, I find and award to condemnees in this case, namely, S.K. Brown the total sum of $55,750.00, Sam Story Mobley the total sum of $3,000.00, and Burnis Coleman the total sum of $1,750.00; and I respectfully recommend to the Court that the said property be condemned by a judgment in rem to the use

of the condemnor upon the payment of the last stated sums into the registry

This 2nd day of September, 1971.

(s)_____

Special Master

GEORGIA, BURKE COUNTY.

I, RAYMONG N. DELAIGLE, Clerk of the Superior Court in and for said County, hereby certify that the above is a true and correct copy of RETURN OF SPECIAL MASTER, in the above stated case, as the same appears of file and of record in Civil Action number 512, in Minute Book EE, Page 318, 325 and in Deed Book ——, page ——— in this office.

WITNESS my hand and seal of said Court, this 2nd day of September, 1971.

(s)_____

Clerk, Superior Court, Burke County, Georgia

FILED IN OFFICE
THIS 2nd DAY OF
Sept., 1971

(s)_____

Clerk, Superion Court
Burke County, Ga.

SUPERIOR COURT
CIVIL ACTION FILE NO. 512

GEORGIA, BURKE COUNTY.

JUDGMENT OF COURT

It appearing to the Court that:

Special Master duly appointed and qualified has made an award and finding in the above stated case;

All provisions of law as to service and notice on all partice interested in the property described in the petition have been complied with, pursuant to orders and directions of the Court consistent with justice and due process of laws:

It is decreed, ordered and adjudged that all the property described in this petition, to-wit:

> All that tract or parcel of land situate, lying and being in the 66th G.M. District of Burke County, Georgia, and being more particularly described as

follows: BEGINNING at an iron pin corner common to lands of James Mathis and lands of S.K. Brown, said corner having a co-ordinate value of X 624,998.938 and Y 1,147,251.011 as determined by the Plane Co-ordinates of "The Georgia Co-ordinate System, East Zone", said corner is located on the Westerly edge of the Savannah River; thence from said Point of Beginning Southeasterly along the Westerly edge of said River the following bearings and distances: South 47 deg. 31' 20" East 458.20 feet to a point; thence South 39 deg. 39' 03" East 280.45 feet to a point; thence South 35 deg. 18' 18" East 278.45 feet to a point; thence South 30 deg. 41' 43" East 156.16 feet to a point; thence South 42 deg. 02' 08" East 246.83 feet to a point; thence South 34 deg. 59' 38" East 326.48 feet to a point; thence South 35 deg. 55' 19" East 294.47 feet to a point; thence South 40 deg. 45' 21" East 470.85 feet to an iron pin; thence leaving said Westerly edge of said River South 42 deg. 18' 01" West along the dividing line between lands of Kimberly-Clark

Corporation and lands of S.K. Brown 2418.45 feet to an iron pin; thence South 59 deg. 18' 01" West along said dividing line 1683.75 feet to an iron pin; thence South 59 deg. 18' 01" West along the dividing line between lands of Roberts-Augusta, Inc. and lands of S.K. Brown 261.25 feet to an iron pin; thence North 26 deg. 40' 03" West along the dividing line between lands of Elizabeth Barefield and lands of S.K. Brown 2606.23 feet to an iron pin; thence North 63 deg. 47' 27" East along the dividing line between lands of Charlie Mathis and lands of S.K. Brown 1167.97 feet to an iron pin; thence North 63 deg. 42' 41" East along the dividing line between lands of Daisy Harper and lands of S.K. Brown 234.80 feet to an iron pin; thence North 53 deg. 56' 22" East along said dividing line 276.76 feet to an iron pin; thence North 53 deg. 56' 22" East along the dividing line between lands of James Mathis and lands of S.K. Brown 949.34 feet to an iron pin; thence North 45 deg. 16' 12" East along said dividing line 232.65 feet to an iron pin; thence

North 27 deg. 49' 41'' East along said dividing line 995.28 feet to an iron pin and the Point of Beginning, containing 228.8 acres, more or less, and being more particularly shown according to a plat of survey made for Georgia Power Company Land Department, prepared by George D. Tabakian, Registered Land Surveyor, dated August 6, 1971, attached to said petition.

The above described tract of land is all of that land lying and being in the 66th G.M. District of Burke County, Georgia, said tract is more particularly described in Deed dated April 14, 1964 from Burnis Coleman to S.K. Brown which is recorded in Deed Book 73, Page 597 in the Office of the Clerk of Superior Court of Burke County, Georgia.

AND

1. S.K. Brown, 3019 Harper Street, Augusta, Georgia

2. Farmers Production Credit Asso-

ciation, 6th Street, Waynesboro, Georgia

3. Honorable Mrs. Mary O. Herrington, Ordinary, Burke County, Georgia

4. Honorable Mrs. John R. Dinkins, Tax Commissioner, Burke County, Georgia

5. Sam Story Mobley, Waynesboro, Georgia

6. Burke County Hunting Club, Waynesboro, Georgia

7. Burnis Coleman, RFD, Waynesboro, Georgia

JUDGMENT OF COURT (continued)
CIVIL ACTION FILE NO. 512

be, and the same is hereby condemned in fee simple; and upon the payment of the sum of $55,750.00 for S.K. Brown, Condemnee, the sum of $3,000.00 for Sam Story Mobley, and the sum of $1,750.00 for Burnis Coleman, the Plaintiff, Georgia Power Company, and its suc-

cessors and assigns, are hereby vested with full, complete, and unencumbered fee simple title to all the land, improvements and appurtenances described in the petition.

Let this order be filed as part of the record in this case.

This 2nd day of September, 1971.

File No. ————————
Hour Filed ————————M.
Date Filed, May 3, 1972
(s) _____
Deputy Clerk Superior Court
Burke County, Georgia
(s) _____
Judge, Superior Court,
Augusta Judicial Circuit

GEORGIA, BURKE COUNTY.

I, RAYMOND N. DELAIGLE, Clerk of the Superior Court in and for said County, hereby certify that the above is a true and correct copy of JUDGMENT OF COURT, in the above stated case, as the same appears of file and of record in Book No. EE, Page No. 318-325 in my office.

WITNESS my hand and seal of said Court,

this 2nd day of September, 1971.

(s)_____
Clerk, Superior Court, Burke County, Georgia

Burke County, Georgia
Real Estate Transfer Tax
Paid $56.00
Date September 3, 1971
(s)_____
Clerk of Superior Court

BURKE SUPERIOR COURT
NO. 512

GEORGIA POWER COMPANY, Plaintiff
vs.
S.K. BROWN, ET AL., Defendant

MOTION FOR NEW TRIAL

S.K. Brown, defendant above named, moves the court to set aside the verdict returned herein on August 29, 1972, and the judgment entered thereon on September 1, 1972, and to grant a new trial on the following grounds:

(1) The verdict is contrary to law.

(2) The verdict is contrary to the evidence.

(3) The verdict is strongly against the weight of the evidence.

Dated: September 28, 1972

(s)_____
Jerry M. Daniel
(s)_____
George W. Fryheier
ATTORNEYS FOR MOVANT

217 East Sixth Street
Waynesboro, Georgia 30830

P.O. Box 66
Waynesboro, Georgia 30830

Rule Nial and Supersedeas

The foregoing motion read and considered. Counsel for the opposing party is (are) hereby ordered to show cause before me on the 31 day of October, 1972, at 10:30 o'clock A.M.

at the Courthouse in Augusta, Georgia, why the motion should not be granted.

Let this order act as a supersedeas until further order of court. In the meantime and until the final hearing of said motion, whenever the same may be had, movant is allowed to amend and perfect the motion, and to prepare and present for approval, a transcript of the evidence and proceedings, which transcript may be filed in the Clerk's office at any time within ten (10) days after the motion is heard and determined.

If for any reason, said motion is not heard and determined at the time and place above fixed, it is ordered that the same be heard and determined at such time as may be agreed upon by counsel, and upon failure to agree, then at such time and place as the presiding Judge may fix, on the application of either party, of which time and place the opposite party shall have at least five days' notice; and if for any reason this motion is not heard and determined before the beginning of the next term of this court, then the same shall stand on the docket until heard and determined at any term thereafter.

This 28 day of September, 1972

(s)_____
Judge, Burke Superior Court

IN THE SUPERIOR COURT FOR THE
COUNTY OF BURKE, STATE OF GEORGIA
CIVIL ACTION, FILE NO. 512

J U D G M E N T

GEORGIA POWER COMPANY, CONDEMNOR,
VS.
S.K. BROWN, ET AL., CONDEMNEE.

This action came on for trial before the Court and a jury, the Honorable F. Frederick Kennedy presiding, and the issue having been duly tried and the jury having duly rendered its verdict therein in favor of the Condemnee, the sum of Seventy Thousand ($70,000.00) Dollars compensation for loss of land; and,

It appearing to the Court that the Condemnor deposited into the Court the sum of Fifty-five Thousand, Seven Hundred Fifty ($-55,750.00) Dollars.

IT IS THEREFORE, CONSIDERED, ORDERED AND ADJUDGED, that the Condemnee, S.K.Brown, et al., have and recover of the Condemnor, Georgia Power Company, the sum of Seventy Thousand ($70,000.00) Dollars together with interest on the sum of Fourteen Thousand, Two Hundred Fifty ($14,250.00) Dollars at the rate of seven (7%) per cent per annum from September 2, 1971, and all costs of Court.

IT IS FURTHER ORDERED that the Clerk of the Superior Court apply upon payment of this Judgment said sum of Fifty-five Thousand, Seven Hundred Fifty ($55,750.00) Dollars and in the event said sum has been disbursed to the Condemnee that he credit this Judgment with said sum.

This 1st day of September, 1972.

(s) _____
F. Frederick Kennedy, Judge, Superior Court, Richmond County, Georgia.

This statement is born out by the Record of the trial which Petitioner has been unable to obtain.

LIBRARY
SUPREME COURT, U. S.

FILED
JUL 15 1974
MICHAEL RODAK, JR., CLERK

In The
Supreme Court Of The United States

OCTOBER TERM, 1973

No. 73-1864

S. K. BROWN,

Petitioner,

vs.

Georgia Power Company,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION

Robert C. Norman
Post Office Box 1564
Augusta, Georgia 30903
Counsel for Respondent

Of Counsel:
Hull, Towill, Norman,
Barrett & Johnson
Post Office Box 1564
Augusta, Georgia 30903
Area Code 404, 722-4483

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In The
Supreme Court Of The United States

OCTOBER TERM, 1973

No. 73-1864

S. K. BROWN,

Petitioner,

vs.

Georgia Power Company,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (App. 4 of Petition) is reported at 371 F. Supp. 543. The opinion of the Court of Appeals for the Fifth Circuit (App. 1 of Petition) is reported at F.2d .

QUESTIONS PRESENTED

1. Whether the dismissal of petitioner's Federal lawsuit which thereby relegated petitioner to seek relief in state forums was in harmony with existing Federal law.

2. Whether this Court should grant a writ of

certiorari to consider issues which are not essential to the proper disposition of the case or which have been previously decided adversely to petitioner.

3. Whether this Court will grant a writ of certiorari to consider matters raised for the first time in the petition and which are *dehors* the record.

STATEMENT OF THE CASE

Georgia Power is a public utility engaged in the business of producing and distributing electric power. In order to meet growing public demand for energy, Georgia Power selected a 1,200 acre site in rural Burke County, Georgia for construction of electrical generating facilities - presently gas turbine facilities, and in the future nuclear facilities. (Supp. A. 29-36).[1]

After unsuccessfully attempting to purchase petitioner's (hereinafter referred to as "Brown") land, Georgia Power, pursuant to the authority granted it by the laws of the State of Georgia, *viz.*, Ga. Code Ann. Chapter 36-6A, commenced a condemnation action in the Superior Court of Burke County on August 11, 1971, (Supp. A. 5-9). By order of the Superior Court a Special Master was appointed to conduct a hearing and determine the value of Brown's land. (Supp. A. 10; Ga. Code Ann. §36-605a-606a). Notice in the form of a citation was served on Brown. (Supp. A. 16). In the citation Brown was notified that he was *"required"* to raise all matters material to his rights in the land before the Special Master. (Supp. A. 13). Upon the request of Brown, the date of the Special Master's hearing was continued until August 31, 1971, in order to

[1] "A" references are to the printed appendix on appeal to the United States Court of Appeals for the Fifth Circuit. "Supp. A" references are to the printed supplemental appendix on appeal to the Court of Appeals for the Fifth Circuit.

accommodate the fact that Brown had employed counsel. (Supp. A. 19).

On August 31, 1971, a condemnation hearing in the case was held before Special Master R. U. Harden, Esquire. At the commencement of the hearing Mr. Harden asked: "Do you have any further motions before we start?" At that time the plaintiff's attorney said: "No. I think we are ready to proceed." (Supp. A. 22). Thereafter, plaintiff's attorney made a motion in which he argued that there was no evidence showing the necessity for the taking of the property. He stated that in the absence of such a showing there would be a violation of the Fourteenth Amendment of the United States Constitution. (Supp. A. 101-102). Plaintiff's attorney made no other challenge to the legality of the proceeding or in regard to Georgia Power's authority to condemn.

After hearing argument by counsel, the Special Master denied the motion. (Supp. A. 105).

On Thursday, September 2, 1971, two days after the hearing, the Special Master made an award which was duly filed in the Burke County Superior Court. (Supp. A. 143). On September 2, 1971, a judgment approving the award was signed by Judge William M. Fleming, Jr. of the Burke County Superior Court. (Supp. A. 147). Brown had filed no exceptions with the Superior Court prior to its entry of judgment.

On September 10, 1971, Brown, as condemnee, filed a document which he described as an Answer, and also an Appeal to the Superior Court of Burke County. (Supp. A. 155, 157). These documents alleged that the award of the Special Master was improper because it violated the United States

Constitution. Georgia Power Company filed motions to strike the allegations concerning the constitutional issues on the grounds that under Georgia law these could not be considered by the Superior Court on an appeal since the issue of constitutionality was raised before the Special Master and exceptions were not filed to the adverse rulings prior to the Superior Court entering a judgement approving the award by the Master.

The Superior Court, *after a hearing* and *after argument from counsel,* entered orders striking Brown's Answer and Appeal. (Supp. A. 160, 161; App. 30-31, 37-38 of Petition).

At that juncture, Brown still had the right to appeal before a jury the $55,750.00 valuation which the Special Master had put on his land. This he did in a jury trial on August 28, 1972. The jury increased the valuation to $70,000.00. (Supp. A. 162-63).

Georgia Power had previously paid the $55,750.00 into the registry of the Superior Court on Brown's account. Brown subsequently withdrew these funds by having $39,705.45 paid to himself and having $16,044.53 paid to Farmers Production Credit Association. (Supp. A. 153).

On September 28, 1972, Brown, through his attorneys, Jerry M. Daniel, Esquire and George W. Fryhoefer, Esquire, filed in the Superior Court of Burke County a "Motion for New Trial". An order of the Superior Court set October 31, 1972 as the date for a hearing on the motion. (Supp. A. 165). However, continuances have been granted since that time and the motion is still pending before the state tribunal. Upon the disposition of that motion, Brown will then have the option to pursue state

appellate remedies as allowed by law.[2]

The present Federal action was commenced in the United States District Court for the Southern District of Georgia, Augusta Division, on January 30, 1972 (A. 1). Upon Georgia Power's motion, the District Court entered an opinion order granting summary judgment in the Company's favor. (A. 36). The court's order was based upon an application of principles of *res judicata*.

This order was appealed to the United States Court of Appeals for the Fifth Circuit which affirmed in a *per curiam* opinion citing the opinion of the District Court. The Court of Appeals did briefly state that it too was of the opinion that whatever relief Brown might seek should be sought in the state appellate courts.

ARGUMENT

INTRODUCTION

Before considering the matters presented in the petition, some elaboration concerning the Georgia eminent domain procedure should be helpful. In order to provide a simpler, more effective, and quicker method of condemnation, the Georgia legislature passed what is known as the Special Master Act, Ga. Code Ann. Chapter 36-6A. The statute contemplates that the Special Master shall conduct a hearing at which he will decide issues falling into two categories - - i.e., value of the land and all "other material matters".[3] For issues

[2] Ga. Code Ann. §6-803. Accordingly, this Court should view petitioner's arguments in light of the fact that Brown still has his rights to appeal in Georgia and to then seek review by certiorari. On appeal from the pending litigation in the state court, Brown may assert as error each of the questions which he attempts to have this Court consider.

[3] Ga. Code Ann. §36-613a, §36-605a.

concerning value, a condemnee may state his case before the Special Master, and then, if a notice of appeal is filed within 10 days of the Special Master's award, the condemnee may have a *de novo* trial on value before a jury in the Superior Court.[4] This provision for notice of appeal within 10 days and the *de novo* trial concerns the question of value only. *Leach* v. *Georgia Power Company*, 228 Ga. 16, 22, 183 S.E.2d 755 (1971).

For issues other than value, e.g., the validity of the procedure, the authorization of the condemnor, necessity for taking, another route must be followed. First the condemnee is ordered in the "Citation" (Supp. A. 11-13) and by the statute (Ga. Code Ann. §36-605a) to initially present these matters to the Special Master for his determination. Georgia appellate decisions have consistently held that this is a mandatory step in raising and preserving such issues.[5]

If the Special Master rules adversely to the condemnee on any of these non-value matters, the condemnee's recourse is to the Superior Court by filing exceptions to the Special Master's rulings. This must be done before the Superior Court adopts the findings of the Special Master and makes those findings the judgment of the court. When the Superior Court enters judgment on the Master's award, that is a final determination of every issue except value, to which the ten day appeal process

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[4] Ga. Code Ann. §36-614a.

[5] **Wiggins** v. **City of Macon,** 120 Ga. App. 197, 199, 169 S.E.2d 667 (1969); **Johnson** v. **Fulton County,** 103 Ga. App. 873, 881, 121 S.E.2d 54 (1961).

still applies, and title then vests in the condemnor.[6] The Special Master may submit his award to the Superior Court at any time within three days after the hearing.[7] After the receipt of the Special Master's award at some time within the three days, the Superior Court may forthwith enter a judgment based on the award.[8]

In sum to raise and preserve matters other than the value of the land, a condemnee must do two things. He must raise the issue before the Special Master, and must immediately file exceptions to the Master's rulings or possible rulings before the Superior Court receives the award and enters judgment on it.[9]

THE LOWER COURT'S APPLICATION OF RES JUDICATA IS IN HARMONY WITH EXISTING FEDERAL LAW.

When the Superior Court entered judgment on the Special Master's award, it cut off the time for excepting to the award on grounds other than value. The judgment was final as to the validity of the condemnation and the vesting of title in condemnor. The Superior Court expressly reaffirmed

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[6] Ga. Code Ann. §36-613a; **Leach** v. **Georgia Power Company,** 228 Ga. 16, 183 S.E.2d 755 (1971); **Nodvin** v. **Georgia Power Company,** 125 Ga. App. 821, 189 S.E.2d 118 (1972); **Johnson** v. **Fulton County,** supra, n.5.

[7] Ga. Code Ann. §36-612a.

[8] Ga. Code Ann. §36-613a.

[9] Since the Code does not provide for a specific time other than a three day period for the Special Master to file his return, a condemnee must be prepared for the return to come at any time within three days and thus should have his exceptions filed at the close of the Special Master hearing.

this position when it later struck the "Answer" and "Appeal" which attempted to raise non-value objections to the condemnation.

It was correctly determined by the District Court below that this action by the Superior Court was an adjudication on the merits of Brown's claim, *to wit,* that he was not denied due process in not being notified when the Special Master's award was to be made the judgment of the Superior Court so he could first file exceptions. It was also an adjudication on the merits of whether the 10 day period for appeals on "value" applies to appeals on other matters as well.

The Courts of Georgia have repeatedly held that the entry of judgment on the Special Master's award by the Superior Court is a final adjudication of all matters other than value.[10] The fact that Brown was foreclosed because the Superior Court ruled according to the Georgia decisions requiring Brown's exceptions to be filed before judgment on the Special Master's award makes the adjudication no less binding in regard to the Constitutional due process claims. A holding preventing the filing of exceptions after entry of judgment is an implicit rejection of the argument that the Georgia procedure offends due process.[11]

There having been a final judgment by the Superior Court that rejected (directly or implicitly)

[10] **Phillips** v. **Georgia Power Company,** 225 Ga. 289, 168 S.E.2d 150 (1969); **Fulton County** v. **Aronson,** 216 Ga. 497, 117 S.E. 2d 166 (1960); **Nodvin** v. **Georgia Power Company,** 125 Ga. App. 821, 189 S.E.2d 118 (1972); **Johnson** v. **Fulton County, supra,** n. 5.

[11] **Angel** v. **Bullington,** 330 U.S. 183, 190 (1946); **Grubb** v. **Public Utilities Commission of Ohio,** 281 U.S. 470, 478-79 (1930).

the claims by Brown, it is incumbent upon Brown to seek review in the state appellate system and then the United States Supreme Court. He was correctly denied access to the District Court to begin anew with a collateral suit.[12] [13]

PLEADING A CASE UNDER 42 U.S.C. §1983 DOES NOT CIRCUMVENT THE LAW REGARDING BAR BY JUDGMENT.

Brown suggests that pleading a case under a Civil Rights statute opens the door to a Federal forum regardless of a previous adjudication in a state forum. However, the authority cited in support of this contention is not on point. *County of Allegheny* v. *Frank Mashuda Co.*[14] was a diversity case which simply allowed a district court to hear a case in which the prerequisites of diversity jurisdiction were met. The case just happened to be a condemnation matter. *Mitchum* v. *Foster*[15] *established that 42 U.S.C.* §1983 was a legislated exception to the federal anti-injunction statute.[16] It by no means indicated that the Civil Rights Act created an exception to finality of judgments and the law of "full faith and credit".[17]

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[12] **Angel** v. **Bullington,** 330 U.S. at 189-190.

[13] The pending motion for a new trial by Brown does not lessen the res judicata effect of the Superior Court rulings. **Pope** v. **Shipp,** 38 Ga. App. 483, 144 S.E. 345 (1928); **Denham** v. **Shellman Grain Elevator, Inc.,** 444 F.2d 1376, 1380 (5 Cir. 1971). Brown's citation of a case (Petition, p. 17) which was actually appealed is inapposite.

[14] 360 U.S. 185 (1959).

[15] 407 U.S. 225 (1972).

[16] 28 U.S.C. §2283.

[17] 28 U.S.C. §1738.

To the contrary, the great majority of lower Federal courts which have considered the question have held that 42 U.S.C. §1983 does not transcend the finality of judgments.[18]

ANY ALLEGED INADEQUACY IN THE GEORGIA PROCEDURE WAS OF NO PREJUDICE TO PETITIONER.

The primary argument that Brown presents in his petition concerns the fact that the Georgia legislature did not require in the Special Master Act that notice be given to the condemnee when the Special Master filed his return in the Superior Court. The Act only requires that the Master's award be entered within three days of the hearing. The Superior Court is then left to immediately make that award the judgment of the Court thereby vesting title in the Condemnor and ending the period for filing exceptions to the Master's award on grounds other than the correct determination of value.

As will be noted in the succeeding arguments, appellate procedure is a matter within the discretion of a state. What is more, the condemnee *sub judice* was represented by able counsel. (Supp. A. 21). The Georgia Courts in the numerous decisions previously cited in this response had made clear the requirements for addressing non-value arguments to the Special Master and the

[18] **Thistlethwaite** v. **City of New York,** F.2d (2 Cir. 1974), 42 LW 2630; **Francisco Enterprises, Inc.** v. **Kirby** 482 F.2d 481, 485 (1973); **cert. den.** U.S. (1974), 42 LW 3468; **PI Enterprises Inc.** v. **Cataldo,** 457 F.2d 1012 (1 Cir. 1972); **Coogan** v. **Cincinnati Bar Association,** 431 F.2d 1209 (6 Cir. 1970); **Brown** v. **Chastain,** 416 F.2d 1012 (5 Cir. 1969); **Rhodes** v. **Meyer,** 334 F.2d 709 (8 Cir.), **cert den.** 379 U.S. 915 (1964).

Superior Court. A condemnee, thus represented at a time when the statutory requirements had been repeatedly specified and emphasized on appellate review, is substantially handicapped in asserting that he is the victim of unreasonableness and injustice.

What is even more striking is that Petitioner was not really prejudiced by the lack of notice which he has so fervently presented for scrutiny at all levels of the federal judiciary. To prove this point, it can even be assumed *arguendo* that the lower courts should have rejected *res judicata* and given Brown a federal forum. It can also be assumed *arguendo* that Brown should have been given notice before the Superior Court entered judgment on the Master's award. Then assume that to remove the prejudice of the lack of notice, Brown must be allowed to present for adjudication all the arguments which he could have presented by filing exceptions with the Superior Court had he been given notice in the first place. But the fact remains, even after making the above assumptions, which Georgia Power will argue should not be made, that Brown had only *one* point on which he could have based an exception.

It must be remembered that the Georgia law requires non-value issues to be raised not only by exceptions filed with the Superior Court but also by presentation to the Special Master.[19] The only non-value matter presented to the Special Master concerned a Constitutional challenge to the necessity for condemning Brown's land. This objection was denied by the Special Master and no other non-value matter was ever presented.[20] While Brown

[19] **Ante** at p. 6-7.

[20] **Ante** at p. 3.

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[19] **Ante** at p. 6-7.

[20] **Ante** at p. 3.

may claim that he had no notice when the Superior Court entered judgment, he does not and cannot contend that there was any excuse for not presenting his contentions to the Special Master. (Supp. A. 11-13, 16, 17, 19, 21).[21]

Thus even if Brown had been notified in order to allow him to file exceptions before the Superior Court entered judgment, he could only have sought judicial review of the necessity for the condemnation, the one issue which was raised before the Master. And even assuming that Brown lost the opportunity to challenge the necessity of the taking, no issue of Constitutional significance was or is presented, because this Court has long espoused the view that necessity for taking does not merit judicial review and is not a matter subject to the United States Constitution.[22]

THE MECHANICS OF APPEAL IN THE GEORGIA EMINENT DOMAIN STATUTE ARE NOT OF CONSTITUTIONAL IMPORTANCE.

In asserting a denial of due process in the rapid succession in which the entry of judgment of the Superior Court of Burke County followed the report of the Special Master, Brown complains that he was not given sufficient notice in order to file exceptions with the Superior Court. The harm here, according to Brown, is that this procedure took away his right to have the decisions of the Special Master reviewed by the Superior Court.

It is correct that the entry of judgment by the Superior Court ended any chance for review of

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[21] **Ante** at p. 2-3.

[22] **Joslin Mfg. Co.** v. **City of Providence,** 262 U.S. 668, 678 (1923).

non-value matters for which exceptions had not been filed.[23] Nonetheless, the procedure for review of Special Master decisions as adopted by the legislature and courts of Georgia is a matter exempt from Constitutional scrutiny. There is no due process right to an appeal. It is within the discretion of the State of Georgia to empower a Special Master to decide all issues relevant to condemnation. It is also within the State's discretion to allow no appeal from those decisions or to allow an appeal only if exceptions are filed prior to judgment by the Superior Court, and it was for the State to decide that a notice provision would not be added to the procedural framework. If the process was improperly implemented, it is in any event for state courts to decide.[24]

Thus regardless of the propriety of the *res judicata* holding below, Brown's complaint about the Georgia procedure which allowed the judgment of the Superior Court to terminate the opportunity to obtain review of the Special Master's award is only an objection to the procedure for appeal. This Court has long held that state appellate procedures are not subject to the due process clause. No purpose would be served by granting certiorari here to review again this oft decided point of law.

THE IMPLEMENTATION OF THE GEORGIA EMINENT DOMAIN STATUTES PRESENTS NO FEDERAL OR CONSTITUTIONAL ISSUE.

It should also be noted that even if some Constitutional flaw were to be found in the absence of notice to Brown that the Superior Court would enter judgment on the Special Master's award, the

[23] **Ante** at p. 6-7.

[24] **Lindsey** v. **Normet,** 405 U.S. 56, 77 (1972); **Reetz** v. **Michigan,** 188 U.S. 505, 508 (1903).

underlying Constitutional issues which Brown would then raise have no merit. Looking to Brown's complaint in the District Court, one sees that the absence of notice in the entry of judgment by the Superior Court is presented as a justification for District Court consideration of Brown's substantive challenges to the condemnation of his former land, e.g., Georgia Power did not have statutory power to condemn in fee simple; it violated equal protection for Georgia Power to be able to condemn land while other companies could not; the condemnation statutes did not require sufficient proof of necessity to condemn or provide for proof of uniqueness or unique value of condemned land. (A. 5-6, 8-10).

However, these types of challenges are manifestly inappropriate for Federal review. Whether an eminent domain statute is correctly administered by the state judiciary is a state matter, and even a violation of the statute by the state does not infringe upon rights secured by the laws and Constitution of the United States.[25] To the extent that the Georgia statutes themselves are challenged, this Court has long held that if "any compensation" is paid for the condemned land, the condemnation is in compliance with the United States Constitution.[26] Matters of administration of the state statute, procedure, necessity, and uniqueness are state concerns.[27]

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[25] **Snowden** v. **Hughes,** 321 U.S. 1, 8-12 (1944); **McDonald** v. **State of Texas,** 465 F.2d 1342, 1345-46 (5 Cir. 1971), **en banc,** 465 F.2d 1349.

[26] **McGovern** v. **New York,** 229 U.S. 363, 370-71 (1913).

[27] **Backus** v. **Fort Sheet Union Depot Company,** 169 U.S. 557 (1898); **Adriondack Railroad Co.** v. **New York,** 176 U.S. 335 (1900); **Sears** v. **Akron,** 246 U.S. 242 (1918); **Bragg** v. **Weaver,** 251 U.S. 57 (1919); **Rindge Company** v. **Los Angeles County,** 262 U.S. 700 (1923).

Thus regardless of the *res judicata* effect of the judgment of the Superior Court of Burke County, and regardless of whether this Court is concerned with the Georgia procedure for appealing the findings of a special master, the substance of Brown's District Court action does not state a claim on which relief could be granted. The pleadings below simply ask the court to find Constitutional issues where this Court has plainly indicated that there are none. If there is then no merit in the substance of Brown's federal action, a grant of certiorari based on other matters presented by him would only be a hypothetical and academic exercise.

BROWN'S COLLATERAL SUIT IN FEDERAL COURT IS BARRED BY ESTOPPEL.

There remains one other measure by which Brown's federal suit is found lacking. It too is a sound basis for dismissal without reaching federal or Constitutional claims. The underlying facts are that Brown has withdrawn from the Superior Court the $55,750.00 awarded by the Special Master and paid by Georgia Power and has applied those funds to his personal use. (Supp. A. 153). The estoppel arises under the established principle that "a litigant shall not be heard to impugn the validity of a proceeding, of which, to a substantial degree, he has voluntarily accepted the benefits, no matter in what state of maturity the proceedings may be."[28]

[28] **Wilson** v. **Union Electric Light and Power Company,** 59 F.2d 580, 583 (8 Cir. 1932); **accord, Robinson** v. **Transcontinental Gas Pipe Line Corp.,** 306 F. Supp. 201, 208 (N.D. Ga. 1969), **aff'd on other grounds,** 421 F.2d 1397 (5 Cir. 1969), **cert. den.,** 398 U.S. 905 (1969); **Livesay Industries** v. **Livesay Window Company,** 202 F.2d 378 (5 Cir. 1953); **See also, Davis** v. **Wakelee,** 156 U.S. 680, 691 (1895); **Burgess** v. **Nail,** 103 F.2d 37, 44 (10 Cir. 1939).

Here Brown has accepted the Master's award but in the substantive counts of his federal complaint alleges various reasons why the Master's award should be overturned. Regardless of the validity of the procedure whereby the Superior Court entered judgment on the Master's award, Brown in accepting the amount of the award has lost the right to challenge on substantive grounds what occurred in the Special Master proceeding. Accordingly no purpose would be served by a decision of this Court concerning notice and the entry of judgment.

THE REMAINING QUESTIONS PRESENTED BY PETITIONER WERE NOT PROPERLY RAISED BELOW NOR SUPPORTED BY THE RECORD.

Brown asserts a constitutional deprivation through allegations that the record of trial in the Superior Court of Burke County, Georgia has not been made available to him, and in the fact that the Superior Court without first giving notice or allowing a hearing struck his "Answer" and "Appeal" wherein he attempted to raise issues other than value. (Supp. A. 31-35).

There is not one thing in the record to support the contention that Brown has been deprived of the record. In fact this is a false statement.[29] Furthermore, even if true, there are ample state remedies to require the court reporter or the Clerk of the Superior Court to furnish the record. (Ga. Code Ann. §64-101).

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[29] The court reporter for the Superior Court of Burke County, Georgia delivered this transcript to counsel for Brown and Georgia Power during the week of June 10, 1974, and Brown's motion for new trial has been rescheduled.

The record is also completely void of any attempt by Georgia Power to withhold any record of trial from Brown. Additionally the issue was not asserted whatsoever in the District Court and the only grounds for this proposition before the Court of Appeals and this Court is the unsupported assertion in the briefs filed by Brown. Issues unsupported by the record should not be reviewed in this Court.[30]

Similarly in respect to the matter of striking Brown's Answer and Appeal in the Superior Court, the contention is not supported in the record. In fact the record establishes to the contrary - that these filings were stricken only *after a "hearing"* and *"argument of counsel"*. (Supp. A. 36-37, App. 30-31, 38 of Petition). In any event Brown's contention was not raised in any court below and should not be reviewed in this Court.[31]

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[30]**Standard-Vacuum Oil Company** v. **United States,** 339 U.S. 157, 160 (1949); **Evans** v. **Stettnisch,** 149 U.S. 605, 606-07 (1892).

[31]**Adickes** v. **S. H. Kress & Company,** 398 U.S. 144, 147, n.2 (1970); **Lawn** v. **United States,** 355 U.S. 339, 362-63, n.17 (1958).

CONCLUSION

This case is manifestly inappropriate for review by writ of certiorari. As discussed in the foregoing, petitioner's primary contention was adjudicated in a state court proceeding. The District Court and Court of Appeals correctly concluded that *res judicata* requires that petitioner obtain review of that adjudication in the appellate courts of Georgia. The other contentions presented in the present petition almost trifle with this Court by presenting matters unsupported in the record or not raised below.

Moreover even if this Court were to differ from the conclusion concerning *res judicata* the foregoing argument has presented various reasons why the substance of Petitioner's federal action was without merit, or why there was no prejudice to petitioner even if one assumes some irregularity of the type asserted. Where petitioner is foreclosed on the merits of his action, there is nothing to gain in reviewing his claim of Constitutional harm from the procedural determinations made against him.

For these reasons, it is respectfully urged that the Supreme Court not issue a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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Robert C. Norman
Counsel for Respondent